Supreme Court, U.S.
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No. 10- 10-57

IN THE

Supreme Court of the United States

BRUCE MARKS and MARKS, LLC
d/b/a MARKS & SOLOKOV, LLC,

Petitioners,

v.

ALFA GROUP a/k/a CROWN FINANCE FOUNDATION,
ALTIMO HOLDINGS & INVESTMENT LTD,
and FINANCIAL DYNAMICS LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Unlike the First, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuit Courts of Appeal, the Third Circuit does not sustain personal jurisdiction for intentional torts such as defamation which "individually target" forum residents with the *intent* of harming them within the forum under the "effects" test enunciated in *Calder v. Jones*, 465 U.S. 783 (1984) unless (1) the communications are directed to the forum; (2) the communications concern forum related conduct; and/or (3) a "unique relationship" exists between plaintiff's profession and the forum. The Fifth and Sixth Circuit Courts of Appeal also follow the Third Circuit approach.

The minority "effects plus" test (1) fails to take into account technological developments, including the internet and other electronic communications; (2) illogically bases jurisdiction on the content of communications; and (3) creates an unjustified divide between plaintiffs who practice a trade in an industry center, and those who do not. The ultimate result is to deny the forum state's "manifest interest" in providing residents a home (or even U.S.) forum. This is particularly unfair to U.S. residents when foreign defendants use the internet to "individually target" them with the *intent* of imposing harm in the forum, as here. The Court should resolve the Circuit conflict and clarify an "effects" test which addresses internet based torts *intended* to cause harm within the forum. One question is presented:

Does the Due Process Clause of the 14th Amendment to the U.S. Constitution support jurisdiction over defendants who commit intentional torts which "individually target" forum residents with the intent of harming them within the forum, regardless of whether the communications are directed into the forum; the communications concern forum related conduct; and/or a "unique relationship" exists between the plaintiff and the forum, under the "effects" test enunciated in *Calder v. Jones*, 465 U.S. 783 (1984)?

LIST OF PARTIES

Petitioner Bruce S. Marks is an individual. He is the sole member of Petitioner Marks, LLC d/b/a Marks & Sokolov, LLC ("Marks LLC"), which is a limited liability company organized under the laws of Pennsylvania. Respondent Alfa Group a/k/a Crown Finance Foundation ("Alfa/Crown") is organized under the laws of Liechtenstein and the owner of the "Alfa/Crown" companies, including Respondent Altimo Holdings & Investment Ltd, which is organized under the laws of the B.V.I. Respondent Financial Dynamics Ltd. is organized under the laws of England and is the subsidiary of a Maryland company.

CORPORATE DISCLOSURE STATEMENT

Marks, LLC is a limited liability company. It has no parent corporation. It issues no stock. No publicly held company has any ownership interest in Marks, LLC.

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OPINION BELOW

The March 12, 2010 memorandum opinion of the United States Court of Appeals for the Third Circuit that gives rise to this Petition is unreported. It is reprinted in Appendix A hereto ("App. A") at pp. 1a-6a. By order filed on April 5, 2010 the United States Court of Appeals for the Third Circuit denied the petition for panel rehearing and rehearing *en banc*. Appendix B, pp.7a-24a. The memorandum of decision and order dated June 25, 2009 granting the Defendants' motion to dismiss the Complaint under Fed.R.Civ.P. 12(b)(2) have not been published and are attached hereto. Appendix C, pp. 25a-26a.

STATEMENT OF JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254. The United States Court of Appeals for the Third Circuit issued its decision by way of memorandum opinion on March 12, 2010. Panel rehearing and rehearing *en banc* were timely requested. Rehearing was denied on April 5, 2010. Pursuant to Supreme Court Rule 13.1, this Petition was timely filed within 90 days of the panel rehearing denial.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Plaintiff/Petitioner Bruce S. Marks is a Pennsylvania resident and the sole member of Plaintiff/Petitioner Marks, LLC, a law firm which maintains its only office in Philadelphia. A substantial portion of Plaintiffs' practice derives from Russian speakers, including those who do business in Russia and Ukraine.

In 2001, Plaintiffs filed *Norex Petroleum Limited v. Access Industries, Inc. et al.* in U.S. federal court, *inter alia*, against Defendant/Respondent Crown Finance Foundation a/k/a "Alfa Group", a Liechtenstein entity, and its subsidiaries ("Alfa/Crown"). *Norex* accused Alfa/Crown of fraud, bribery, money laundering, and extortion in violation of RICO in relation to the takeover

of an oil company in Russia through corrupted Russian court proceedings. The allegations against Alfa/Crown and its oligarch principal received substantial publicity. The 2007 dismissal of the case for lack of subject matter jurisdiction based on the alleged extraterritorial application of RICO is on appeal before the Second Circuit.

In November, 2008, Alfa/Crown, its subsidiary Defendant/Respondent Altimo Holdings & Investment, Ltd., a BVI company, and their London based public relations firm, Defendant/Respondent Financial Dynamics, Ltd., issued knowingly false press releases, including a memorandum and attachments in English, (collectively, the "Releases") to the media worldwide regarding a dispute with Telenor, a Norwegian company, over Russian and Ukrainian telecommunications assets. The Releases falsely accused Plaintiffs of procuring media articles about Alfa/Crown and Altimo through bribery and attached purportedly emails from and about Marks as "evidence." The allegations and evidence were all fabricated; Plaintiffs had no involvement in the dispute between Alfa/Crown, Altimo, and Telenor; the emails were forged. As Defendants intended, the Releases were published on several websites, accessible worldwide.

As the Third Circuit summarized the Releases:

> Seeking to kill two birds with one stone — to gain the upper hand in the public relations battle [against Telenor] and to extract revenge for the earlier [Norex] lawsuits — Altimo sent a letter to Telenor and distributed

> [the Releases] to the press . . . The [Releases] purported to identify a number of "illegal and inappropriate activities of Telenor" that were directed at Altimo management. ... [The Releases] accused Telenor of engaging in a subversive public relations campaign directed, at least in part, by Marks . . . In addition, the letter attached two fabricated emails to support its accusations, one of which appeared to have been sent by plaintiff Bruce Marks . . .

Id. at 3a.

As the Third Circuit summarized the publication of the Releases:

> The [Release was] circulated to the press and was picked up by three Russian news organizations . . . Those organizations published to the internet articles repeating the allegations that ... Marks had initiated a number of "ordered publications" — publications "obtained through bribery which appear[] as . . . news article[s], usually false, designed to . . . discredit a business competitor or blacken somebody's reputation."

Id. at 3a-4a.

In short, by distributing knowingly false Releases with fabricated emails, Defendants "individually targeted" Plaintiffs for the *sole* purpose of harming them in Pennsylvania in retaliation for filing and litigating

Norex from Philadelphia by falsely accusing them of engaging in illegal conduct, including bribery.

Plaintiffs filed suit, including claims for defamation, in the Eastern District of Pennsylvania where Marks resides and Marks LLC maintains its sole office based on diversity jurisdiction under 28 U.S.C. §1332. Defendants moved to dismiss on various grounds, including lack of personal jurisdiction.

THE DECISIONS BELOW

The district court accepted that "the Releases in issue here were defamatory", "defendants were aware of plaintiffs' offices in Pennsylvania," and "plaintiffs 'have suffered harm in Pennsylvania in the form of damage to their reputations and may lose business and potential business opportunities'". App. B, page 13a. Nevertheless, the court dismissed for lack of personal jurisdiction based on the Due Process Clause of the 14th Amendment, applicable in cases based on diversity jurisdiction, holding that Plaintiffs failed to satisfy the *Calder* "effects" test, as interpreted by the Third Circuit.

Specifically, the court held Plaintiffs did not establish that Defendants "expressly aimed" their conduct at Pennsylvania because the Releases "did not mention plaintiffs' status as residents of Pennsylvania" or "suggest that any of the described wrongdoing had occurred in the Commonwealth." App. B, pp. 20a-21a. The court also noted "there were no allegations that the Releases were specifically directed at Pennsylvania", noting that because "the Releases were disseminated

to the 'media worldwide'" that this "indicates that the comments were directed . . . to a global audience." App. B, page 21a.

In affirming, the Third Circuit held that Plaintiffs did not satisfy the *Calder* "effects" test because (1) Plaintiffs did not allege that "defendants attempted to have their news release published in Pennsylvania"; (2) "Neither the news release nor the articles it spawned refer to Pennsylvania or Marks' practice there"; and (3) "Marks has not alleged that defendants distributed their news releases to specific media organizations based in Pennsylvania." App. A, page 6a. The Third Circuit concluded that Plaintiffs' allegations were "insufficient for a finding that defendants 'expressly aimed' their conduct at the forum," citing Third Circuit precedent. App. A, page 6a.

REASONS FOR GRANTING THE PETITION

This Court should allow the writ because the Third Circuit decision and precedent on which it relies misunderstands *Calder's* interpretation of the Due Process Clause of the 14th Amendment and conflicts with authoritative decisions of seven other Circuits, which sustain personal jurisdiction over defendants who commit intentional torts which "individually target" forum residents with the *intent* of harming them in the forum, regardless of whether (1) communications are directed into the forum; (2) communications concern forum related conduct; and/or (3) a "unique relationship" exists between the plaintiff's profession and the forum. This Court should resolve the conflict between the seven majority Circuits and three minority Circuits.

A state "has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985). Internet technology has changed "modern commercial life," as *Burger King*, 471 U.S. at 476, foreshadowed. The Third Circuit "effects plus" test is out of step with the changes which the worldwide internet has effected and fails to protect U.S. residents from foreign defendants who commit intentional internet based torts *intended* to cause harm within the United States, as occurred here. It hardly violates "traditional conceptions of fair play and substantial justice" to hold defendants responsible in the forum in which they *intentionally* caused harm, *Burger King*, 471 U.S. at 464 (brackets omitted), rather than sending U.S. residents off the to four corners of the world in an attempt to find a forum.

First, the majority Circuits do not require communications to be directed into the forum, recognizing changes in technology no longer require entry into the forum to cause harm; in fact, greater harm is created through the permanency of worldwide publication on the internet compared to "paper" media. Rather, the majority Circuits properly focus on intent and foreseeability of causing harm within the forum.

Second, the majority Circuits do not base jurisdiction on the content of the communications, including a requirement that they describe forum based activity. To do so creates the perverse incentive to fabricate outrageous allegations about non-forum activity in order to impose maximum harm, but to avoid

jurisdiction, as here. A state's interest in providing a forum for its residents is to redress harm; it is irrelevant where the falsely alleged conduct (such as excess drinking in *Calder*) occurred when the harm is suffered in forum.

Third, the majority Circuits do not require a "unique relationship" between the plaintiff's profession and the forum. It makes no sense that jurisdiction can be sustained by the fortuity of whether a plaintiff practices a profession in an industry center, particularly given that most professions or industries (law, accounting, medicine, etc.) do not even have centers.

Here, the justification for adopting an "effects" test to sustain jurisdiction is greater than in *Calder* because Defendants are alleged to have committed an intentional tort with the *intent* to harm Plaintiffs in the forum, unlike *Calder*, where the editor and reporter presumably intended to sell newspapers — the harm to Jones was incidental. In addition, unlike paper publications which are often discarded after reading, internet publication can live forever. Numerous commentators have recognized the importance of clarifying the "effects" test in the internet context.[1]

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1. Teressa Cassidy, *Effects of the "Effects Test": Problems of Personal Jurisdiction and the Internet*, 9 Wyo.L.Rev. 575 (2009); C. Douglas Floyd and Shima Baradarah-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 Ind.L.J. 601 (Spring, 2006); Andrew Halaby, *You Won't Be Back: Making Sense of "Express Aiming" After Schwarzenegger*, 37 Ariz.St.L.J. 625 (Summer 2005).

A. *Calder* Supports The "Individually Targeted" Test Over Internet Based Intentional Torts

Calder held "jurisdiction over [defendants] was proper in California based on the 'effects' of their Florida conduct in California" because:

> [P]etitioners are not charged with mere untargeted negligence. Rather, *their intentional, and allegedly tortious, actions were expressly aimed at California.* Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And *they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works* and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article . . . *An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.*

Id., 465 U.S at 789-90 (citations omitted) (emphasis added).

In short, *Calder* held defendants' actions were "expressly aimed" at the forum because (1) Jones lived and worked there, (2) Jones felt the brunt of the harm there, and (3) given the *technology at the time*, the

circulation of the paper in California made it *foreseeable* to defendants that their conduct would harm Jones because California based movie industry decision makers would learn of the allegations she "drank so heavily as to prevent her from fulfilling her professional obligations," *id.* at 789, fn. 9, making her unemployable. Under *Calder*, jurisdiction in this case should have been sustained because Plaintiffs reside in Pennsylvania, they suffered the "brunt of the harm" in Pennsylvania, and Defendants "expressly aimed" at Pennsylvania because they *intended* to harm Plaintiffs there.

B. The "Individually Targeted" Test Adopted By The Majority Circuits Provides An Effective Means Of Addressing Internet Based Intentional Torts

Seven Circuits sustain jurisdiction over defendants who commit intentional torts which "individually target" forum residents with the *intent* of harming them in the forum regardless of where communications are directed, the communications' content, and/or a "unique relationship" exists between the plaintiff's profession and the forum. Three minority circuits have adopted a narrower test.[2] The majority test has repeatedly been used in the internet context.

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2. Plaintiffs have not found Second and D.C. Circuit decisions on point.

1. Early Fourth, Seventh, and Eighth Circuit Decisions Sustain Jurisdiction When Out of Forum Conduct Is *Intended* to Cause Harm to Individually Targeted Residents in the Forum Following *Calder*

First American First, Inc. v. Nat'l Assoc of Bank Women, 802 F.2d 1511 (4th Cir. 1986) reversed dismissal over defendants who circulated defamatory letters outside of plaintiffs' home state throughout the country, with the intent of interfering with plaintiffs' business in the forum. The court sustained jurisdiction because the defendant "knew . . . that its allegedly defamatory letters would inflict the greatest injury upon Leake in the state in which he resided and conducted his business." *Id.* at 1517. The court did not require the letters to describe conduct in the forum or any "unique relationship" between the plaintiffs and the forum.[3]

Dakota Industries, Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384 (8th Cir. 1991), reversed dismissal where plaintiff sued defendant for trademark infringement, holding that *Calder "approved an 'effects test' that allows the assertion of jurisdiction over non-resident*

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3. *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002) affirmed dismissal of claims by a prison warden who oversaw the housing of Connecticut prisoners in Virginia based on allegedly defamatory internet articles because defendants "did not manifest an intent to aim their websites or the posted articles at a Virginia audience." This case, although similar to the minority approach, can be distinguished because there was no allegation that the reporter's intent was to harm the warden. Instantly, Defendants fabricated the allegations about Plaintiffs to harm them in retaliation for *Norex*.

defendants whose acts are performed for the very purpose of having their consequences felt in the forum state." *Id.* at 1390-91 (*quoting Brainerd v. Governors of Univ. of Alberta*, 873 F.2d 1257 (9th Cir. 1989) (emphasis added).

Janmark, Inc. v. Reidy, 132 F.3d 1200, 1202 (7th Cir. 1997) developed an even more lenient test, holding "there can be no serious doubt after *Calder v. Jones* . . . that the state in which the victim of a tort suffers the injury may entertain a suit against the accused tortfeasor."

2. The Ninth Circuit Refines The "Individually Targeted" Test Based On *Calder*

The Ninth Circuit thereafter refined the "individually targeted" test as a means of applying *Calder*'s "expressly aimed" provision, applicable in the internet context and otherwise. *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1321-22 (9th Cir. 1998) affirmed jurisdiction over a defendant whose relevant contact with the forum was posting plaintiff's trademarks on his internet website. Noting there must be "something more" under *Calder* other than knowledge that harm might be suffered in the forum, the court held the wrongful *intent/purpose* to cause harm in the forum closed the gap:

> *Toeppen engaged in a scheme to register Panavision's trademarks as his domain names for the purpose of extorting money from Panavision. His conduct, as he knew it likely would, had the effect of injuring*

> *Panavision in California where Panavision has its principal place of business* . . . Under the "effects test," the purposeful availment requirement necessary for specific, personal jurisdiction is satisfied.

Panavision, 141 F.3d at 1322 (footnote omitted) (emphasis added).

Thereafter, *Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d 1082 (9th Cir. 2000) upheld jurisdiction over a defendant who sent a letter into Virginia which harmed a known California resident in California by impeding use of a website domain, concluding:

> [*Calder*] cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction. We have said that there must be "something more," but have not spelled out what that something more must be.
>
> We now conclude that "something more" is what the Supreme Court described as "express aiming" at the forum state. *See Calder, 465 U.S. at 789* . . . we deduce that the requirement is satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state . . . *"express aiming" encompasses wrongful conduct individually targeting a known*

> *forum resident . . . The letter was expressly aimed at California because it individually targeted B&M, a California corporation doing business almost exclusively in California.*

Bancroft, 223 F.3d at 1087-88 (emphasis added).[4]

3. The Tenth and Eleventh Circuits Follow the "Individually Targeted" Test When Out of Forum Communications Are Intended to Cause Harm Within the Forum

Dudnikov v. Chalk & Vermillion Fine Arts, Inc., 514 F.3d 1063 (10th Cir. 2008) reversed dismissal where the defendant sent a "NOCI" communication into California to halt an on-line auction conducted from plaintiff in Colorado, holding:

> [While the communication] formally traveled only to California, it can be fairly characterized as an intended means to the further intended end of cancelling plaintiffs' auction in Colorado. In this way, *it is something like a bank shot in basketball. A player who shoots the ball off of the backboard intends to hit the backboard, but he does so in the service of his further intention of*

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4. *See also Menken v. Emm*, 503 F.3d 1050, 1059 (9th Cir. 2007) ("expressly aimed at the forum state . . . requirement [is] satisfied 'when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state'").

> *putting the ball into the basket. Here, defendants intended to send the NOCI to eBay in California, but they did so with the ultimate purpose of cancelling plaintiffs' auction in Colorado. Their "express aim" thus can be said to have reached into Colorado in much the same way that a basketball player's express aim in shooting off of the backboard is not simply to hit the backboard, but to make a basket . . .*
>
> our case is an easier one than *Calder* itself. There, the defendants intended to write an article, the "focal point" of which was California, for the *Enquirer* to publish and distribute in California. 465 U.S. at 789. Yet, the effects of which the plaintiff complained likely were not bound up in the defendants' intentions. The defendant writer and editor were professionals presumably interested chiefly in the sale of newspapers, not in doing *intentional* harm to Ms. Jones; that is, while they *knew* their article would have adverse effects on her in California, those effects were to them perhaps no more than foreseeable side-effects. . . . *[A]ctions that "are performed for the very purpose of having their consequences felt in the forum state" are more than sufficient to support a finding of purposeful direction under Calder.*

Dudnikov, 514 F.3d at 1077-78 (emphasis added).

Licciardello v. Lovelady, 544 F.3d 1280 (11th Cir. 2008), reversed the denial of jurisdiction where plaintiff alleged defendant infringed his trademarked name and picture on a website, applying *Calder* within the internet setting, holding:

> *The unauthorized use of Carman's mark, therefore, individually targeted Carman in order to misappropriate his name and reputation for commercial gain.* These allegations satisfy the *Calder* effects test for personal jurisdiction — *the commission of an intentional tort, expressly aimed at a specific individual in the forum whose effects were suffered in the forum.*

Licciardello, 544 F.3d at 1288 (emphasis added).

4. The First Circuit Also Sustains Jurisdiction When Out of Forum Conduct is *Designed* to Cause Harm in the Forum Based on *Calder*

In *Northern Laminate Sales, Inc. v. Davis*, 403 F.3d 14, 26 (1st Cir. 2005), Davis made misrepresentations in New York which he knew would be relied upon and cause harm in New Hampshire. Recognizing that the defendant "need not be physically present in the forum state to cause injury", citing *Calder*, the court sustained jurisdiction because of Davis "knowing full well that his statements . . . would likely cause financial injury [in the forum state]."

C. The Third Circuit's Requirements Which Conflict With the Majority Circuits Are Not Supported by *Calder* or The Due Process Clause

IMO Indus., Inc. v. Kieker AG, 155 F.3d 254, 265 (3d Cir. 1998), the Third Circuit's seminal case interpreting the "effects" test in the context of business torts (but not defamation), described *Calder* as follows:

> [T]he Supreme Court relied on three principal findings. First, the defendant committed an intentional tort. Second, the forum was the focal point of the harm suffered by the plaintiff as a result of that tort. Third, the forum was the focal point of the tortious activity in the sense that the tort was "expressly aimed" at the forum. Essential was a corollary finding that the defendants knew that the "brunt" of the injury caused by their tortious acts would be felt by the plaintiff in the forum.

IMO, 155 F.2d at 261.

However, despite this accurate summary of *Calder's* key holding, *IMO* went on to establish a requirement absent in *Calder*, i.e. the plaintiff must "point to contacts which demonstrate that the defendant *expressly aimed* its tortious conduct at the forum, and thereby made the forum the focal point of the tortious activity." *IMO*, 155 F.2d at 265. *IMO* further required that "the defendant must 'manifest behavior intentionally targeted at and focused on' the forum for *Calder* to be satisfied . . . In the typical case, this will require some type of 'entry' into the forum state by the defendant." *IMO*, 155 F.2d at 265 (citations omitted).

Based on *IMO's* reading of *Calder*, *Remick v. Manfredy*, 238 F.3d 248 (3d Cir. 2001) affirmed dismissal for lack of personal jurisdiction of claims by a promoter/attorney based on an allegedly defamatory letter which a boxer circulated within and without Pennsylvania about him. In holding that targeting of Remick for harm was insufficient, *Remick* attempted to distinguish itself from *Calder*:

> Remick has not asserted that Pennsylvania has a unique relationship with the boxing industry, as distinguished from the relationship in *Calder* between California and the motion picture industry . . . Even if the letter itself . . . were distributed or shared with other persons in the professional boxing community, such persons were apparently located throughout the country. Unlike the defendants in *Calder*, whose national magazine is published in California more than any other state and whose story focused on California . . . it cannot be said that the defendants here expressly aimed their conduct at Pennsylvania so that Pennsylvania was the focal point of the tortious activity.

Remick, 238 F.3d at 259.

Thereafter, *Marten v. Godwin*, 499 F.3d 290, 298 (3d Cir. 2007) affirmed dismissal of defamation claims based on a letter circulated outside of the forum, relying on *Remick* which it described as follows:

> plaintiff failed to establish jurisdiction over the defamation claim because plaintiff

> provided "no indication that the [defamatory] letter was targeted at . . . anyone in Pennsylvania other than [plaintiff]," and plaintiff did not assert that Pennsylvania had a "unique relationship" with plaintiff's professional community.

Based on its precedent, the Third Circuit affirmed dismissal instantly. The Fifth and Sixth Circuits have followed this approach. *Revell v. Lidov*, 317 F.3d 467, 473 (5th Cir. 2002) (affirming dismissal because allegedly defamatory article posted on the internet "contains no reference to Texas, nor does it refer to the Texas activities of Revell, and it was not directed at Texas readers as distinguished from readers in other states");[5] *Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110 (6th Cir. 1994) (holding no jurisdiction because, *inter alia*, the allegedly defamatory press releases did not concern forum activity and the source of the release was from outside the forum).

Respectfully, when defendants commit intentional torts which "individually target" forum residents with the *intent* to cause harm in the forum, there should be no requirement that (1) communications be directed to the forum (or qualification that circulation outside the forum cuts against jurisdiction); (2) communications refer to the plaintiff's forum conduct; and/or (3) a

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5. *Revell* favorably discussed *Remick v. Manfredi*, particularly the requirement that there be a "unique relationship" between the plaintiff's profession and the forum. 317 F.3d at 474.

"unique relationship" exist between the plaintiff's profession and the forum. Such requirements are not supported by *Calder* or the Due Process Clause:

First, there is no reason that communications be directed to the forum if the defendant *intended* to harm the plaintiff in the forum. Internet technology has changed "modern commercial life," as *Burger King*, 471 U.S. at 476, foreshadowed. Mail and faxes are obsolete. Newspapers are folding. Internet publication is more egregious than transmission to forum based "paper" media because it intentionally reaches a broader audience and can be permanent. Like *Calder*, Defendants are not charged with "untargeted negligence". They reached out with the *intent* to harm Plaintiffs in retaliation for U.S. filed litigation by circulating the Releases as widely as possible with the intent that they be published on the internet.

Second, it does not make sense to sustain jurisdiction if a plaintiff is the subject of defamatory allegations regarding forum conduct, but not when the allegations concerns even more defamatory out of forum conduct, such as committing bribery, as here. This merely encourages clever tortfeasors to fabricate defamatory allegations about out-of-forum conduct, while evading jurisdiction. In *Calder*, Jones' harm was suffered by the *nature* of the accusations, not because the alleged excess drinking necessarily occurred in California.

Third, a "unique relationship" between plaintiffs and forums should not be required; this was relevant in *Calder* only to establish the *foreseeability* of harm in

the pre-internet era because industry decision makers in California were likely to read the *National Enquirer*, which was circulated there. This illogically creates two classes of plaintiffs: (1) those who can sustain jurisdiction because they practice their trade in unique industry centers, *i.e.* movie actors in California (but not New York) and investment bankers in New York (but not California); and (2) those who do not, *i.e.* attorneys, accountants, doctors, and everyone else.

Fourth, unless jurisdiction is sustained in this context, American plaintiffs can be left with no United State forum and no remedy. Plaintiffs, a small law firm and its principal, cannot afford an army of solicitors and barristers to litigate in the BVI or England, where Altimo and Financial Dynamics are organized; litigation in Russia where the powerful oligarch controlled Alfa/Crown maintains its home-base and corrupts courts, as alleged in *Norex*, would be fruitless.

Thus, certiorari is warranted to resolve a split between the Circuits which differ on whether personal jurisdiction may be sustained when defendants commit intentional torts which "individually target" forum residents for harm *intended* to be inflicted in the forum, regardless of whether communications are directed to the forum; communications concern forum related conduct; and/or a "unique relationship" exists between the plaintiff's profession and the forum. Adopting a workable "effects" test in the internet context is particularly important as communications are increasingly, if not predominantly, directed through electronic means which do not require entry into the forum to cause harm.

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MARCH 12, 2010

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-2964

BRUCE MARKS and MARKS, LLC d/b/a MARKS & SOLOKOV, LLC,

Appellants

v.

ALFA GROUP a/k/a CROWN FINANCE FOUNDATION, ALTIMO HOLDINGS & INVESTMENT LTD, and FINANCIAL DYNAMICS LTD.

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. No. 2-08-cv-05651)

Submitted Under Third Circuit LAR 34.1(a)
February 11, 2010

(Filed March 12, 2010)

Appendix A

Before: SLOVITER, ROTH and TASHIMA*,
Circuit Judges.

TASHIMA, Circuit Judge.

Appellants Bruce Marks and Marks, LLC d/b/a Marks & Solokov, LLC (together, "Marks"), appeal the District Court's dismissal of their complaint for lack of personal jurisdiction. We will affirm.[1]

I.

This tale of international deception, revenge, and defamation begins in 2001, when Norex Petroleum Limited, a Russian oil company, filed suit against defendant Alfa Group, alleging that Alfa Group had conspired to take control of an oil company owned by Norex in violation of the federal Racketeer Influenced and Corrupt Organizations Act. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146 (2d Cir. 2005). (App. 42 P23; *see also* App. 60-63.) According to the complaint in this matter, which we accept as true for purposes of this appeal, the Norex lawsuit resulted in substantial negative publicity for both Alfa Group and one of its owners. (App. 38 PP2-3; App. 42 PP24-25.)

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* Hon. A. Wallace Tashima , Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

1. The District Court had subject matter jurisdiction under 28 U.S.C. § 1332. We have jurisdiction under 28 U.S.C. § 1291.

Years later, defendant Altimo Holdings & Investment Ltd. ("Altimo"), a company allegedly controlled by Alfa Group, became embroiled in a dispute with Telenor, a Norwegian company, over a Ukranian telecommunications company jointly owned by Altimo and Telenor. *See Storm LLC v. Telenor Mobile Comm'ns AS*, 2006 WL 3735657 (S.D.N.Y. 2006); *Telenor Mobile Comm'ns AS v. Storm LLC*, 524 F. Supp. 2d 332 (S.D.N.Y. 2007). (App. 38 P5; App. 43 PP27-28.) This dispute, which has spawned litigation across the world, led to the defamatory statements at issue here.

Seeking to kill two birds with one stone — to gain the upper hand in the public relations battle and to extract revenge for the earlier lawsuits — Altimo sent a letter to Telenor and distributed copies to the press. (App. 43-46 PP29-41; App. 65-118.) The letter purported to identify a number of "illegal and inappropriate activities of Telenor" that were directed at Altimo management. App. at 67. It accused Telenor of engaging in a subversive public relations campaign directed, at least in part, by Marks. (App. 67.) In addition, the letter attached two fabricated emails to support its accusations, one of which appeared to have been sent by plaintiff Bruce Marks. (App. 77, 89.)

The Altimo letter was circulated to the press and was picked up by three Russian news organizations. (App. 48 P56.) Those organizations published to the internet articles repeating the allegations that at Telenor's request Marks had initiated a number of "ordered publications" — publications "obtained

through bribery which appear[] as . . . news article[s], usually false, designed to . . . discredit a business competitor or blacken somebody's reputation." App. at 268 P6. (App. 123-37.)

Marks subsequently filed this diversity action in the Eastern District of Pennsylvania, seeking damages for defamation, commercial disparagement, intentional interference with prospective contractual relations, intentional infliction of emotional harm, and invasion of privacy, as well as injunctive relief. The district court dismissed the action, finding that it lacked personal jurisdiction over defendants.[2] (App. 1-16.) Marks filed this timely appeal. (App. 18-19.)

II.

Marks bears the burden of establishing that the exercise of personal jurisdiction over defendants would be consistent with the Due Process Clause of the United States Constitution. *Marten v. Godwin,* 499 F.3d 290, 296 (3d Cir. 2007); *see also* 42 Pa. Cons. Stat. Ann. § 5322(b). To meet his burden, Marks relies on the "effects test" from *Calder v. Jones,* 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984). We agree with the district court that Marks has not alleged facts sufficient to warrant the exercise of jurisdiction over defendants in this case.

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2. We review the District Court's dismissal for lack of personal jurisdiction *de novo. Telecordia Tech Inc. v. Telkom SA Ltd.,* 458 F.3d 172, 176 (3d Cir. 2006).

We have consistently emphasized that *Calder* should be applied narrowly. *See, e.g., IMO Indus. v. Kiekert AG,* 155 F.3d 254, 261-65 (3d Cir.1998) (agreeing with "[t]he majority of our sister circuits that [a narrow construction is most appropriate for] the application of *Calder* to business torts"); *Marten,* 499 F.3d at 297 (stating that, because "the effects test and traditional specific jurisdiction analysis . . . are cut from the same cloth, . . . the effects test prevents a defendant from being haled into a jurisdiction solely because the defendant intentionally caused harm that was felt in the forum state"). At a minimum, Marks must allege facts that establish that defendants "expressly aimed" their conduct at Pennsylvania. *Marten,* 499 F.3d at 297; *IMO,* 155 F.3d at 265-66.

Marks' allegations on this point are insufficient. He alleges nothing more than that defendants knew he practiced law in Pennsylvania when they released the letter to the media. Knowledge of where an individual resides, however, is insufficient to establish jurisdiction, even with an intentional tort. *Marten,* 499 F.3d at 299 ("Marten has alleged only that defendants harmed him while he happened to be residing in Pennsylvania."); *IMO,* 155 F.3d at 266 ("While knowledge that the plaintiff is located in the forum is necessary to the application of *Calder,* . . . it alone is insufficient to satisfy the targeting prong of the effects test.").

The factual allegations in Marks' complaint do not support Marks' conclusory allegations that defendants aimed their conduct at Pennsylvania. Marks does not

allege that defendants attempted to have their news release published in Pennsylvania. Neither the news release nor the articles it spawned refer to Pennsylvania or Marks' practice there. Marks has not alleged that defendants distributed their news release to specific media organizations based in Pennsylvania. To the contrary, the articles were published only by Russian news organizations in the Russian language. *Cf. Noonan v. Winston Co.*, 135 F.3d 85, 91 (1st Cir. 1998) (noting fact that published material was in French suggested it was intended for a French audience). This is insufficient for a finding that defendants "expressly aimed" their conduct at the forum. *Marten*, 499 F.3d at 299; *IMO*, 155 F.3d at 266-68; *Remick v. Manfredy*, 238 F.3d 248 (3d Cir.2001); *see also Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002).

III.

For the above-stated reasons, we will affirm the judgment of the District Court dismissing this case for lack of personal jurisdiction.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED JUNE 25, 2009

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION

NO. 08-5651

BRUCE S. MARKS, et al.

v.

ALFA GROUP, et al.

MEMORANDUM

Bartle, C.J. June 25, 2009

Plaintiffs Bruce S. Marks and Marks, LLC, doing business as Marks & Sokolov, LLC, initiated this diversity action against three foreign defendants: Altimo Holdings & Investments Ltd. ("Altimo"), a holding company organized under the laws of the British Virgin Islands; Crown Finance Foundation ("Crown"), a holding company organized under the laws of the Principality of Liechtenstein and incorrectly identified for docketing purposes as "Alfa Group"; and Financial Dynamics, Ltd. ("Financial"), a London-based "business communications consultancy" incorporated under the laws of England and Wales. The complaint alleges: (1) common law defamation;

(2) statutory defamation under Pennsylvania law; (3) injurious falsehood; (4) commercial disparagement; (5) intentional interference with prospective contractual relations; (6) intentional infliction of emotional harm; (7) invasion of privacy; and (8) injunctive relief. Plaintiffs also seek monetary relief, including punitive and special damages.

Before us is the motion of all defendants under Rules 12(b)(2) and (6) of the Federal Rules of Civil Procedure to dismiss for lack of personal jurisdiction and failure to state a claim upon which relief can be granted.

I.

When a defendant moves to dismiss claims under Rule 12(b)(2), the plaintiff bears the burden of showing that personal jurisdiction exists. *See Marten v. Godwin*, 499 F.3d 290, 295-96 (3d Cir. 2007). At this stage the plaintiff must establish only "a prima facie case of personal jurisdiction" and is entitled to have his allegations taken as true and all factual disputes drawn in his favor. *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 97 (3d Cir. 2004).[1] Nonetheless, the plaintiff must allege "specific facts" rather than vague or conclusory assertions. *Marten*, 499 F.3d at 298.

---

1. The court may later revisit the issue, at which point the plaintiff must produce competent evidence sufficient to establish the existence of jurisdiction by a preponderance of the evidence. *Carteret Sav. Bank, FA v. Shushan*, 954 F.2d 141, 142 n.1 (3d Cir. 1992).

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II.

Plaintiff Bruce Marks is a citizen of Pennsylvania. He is the sole partner in plaintiff Marks, LLC, a Philadelphia law firm with seven attorneys. Together with MS Ltd., a Moscow law firm with six attorneys, and MSB, Ltd., which maintains an office in Kiev with three attorneys, Marks, LLC does business under the moniker Marks & Sokolov, LLC. Their practice focuses in part on "representing persons harmed by fraud or corruption in Russia and Ukraine by finding means to bring their claims in the United States." As a result, they have filed numerous cases against "Russian and Ukrainian criminal and business groups, including many powerful oligarchs . . . ."

Defendants, as noted above, are foreign corporate entities. None maintains offices, owns real property, or conducts business in Pennsylvania.

Defendants Altimo and Crown have been involved in a prolonged dispute with Telenor, a Norwegian company, over ownership and control of a pair of telecommunications companies. On November 12, 2008, Altimo sent a one-page open letter written by its chairman, Andrei Kosogov, to Telenor, accompanied by a three-page summary memorandum and twelve attachments (together, "the Releases"). In the letter, Kosogov requested that Telenor investigate "a wide range of documentary evidence . . . which suggests there has been questionable activity directed at Altimo and

the members of its International Advisory Board." Kosogov wrote:

> A network of legal firms and public affairs agencies in Russia and the UK appear to have undertaken black PR campaigns in the media to try to discredit Altimo, its parent company Alfa Group, and its shareholders involving methods such as payments to journalists and newspapers for the publication of information
> . . . .

The accompanying memorandum, under the heading "Illegal and inappropriate activities of Telenor management against Altimo," asserts in pertinent part that:

> Altimo has recently discovered a number of documents which indicate that various acts of inappropriate and illegal behaviour might have been used by the current management of Telenor and companies hired by Telenor. . . .
>
> The network of firms which appear from the evidence as working on behalf of Telenor include:
>
> Garda World and Hakluyt, two UK-based companies who directed both detective investigations and PR campaigns against Altimo. The former has been instructed by

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> Marks & Sokolov, a legal company operating in the UK, U.S. and Russia.
>
> PBN, an American PR-agent and lobbyist based in Moscow.
>
> Lobbynet, a Russian firm notoriously known for 'black' PR campaigns in the local media.

The memorandum further stated:

> In late March 2008, Marks & Sokolov initiated a number of paid publications in the Russian media to discredit Altimo, Alfa Group and their shareholders. The campaign was directed through Garda World and managed in Russia by Lobbynet. The publications concerned the sudden death of Leonid Rozhetskin, a Russian businessman previously involved in the Megafon affair, and speculated about Alfa's involvement in the plot. As a result, three paid for articles appeared in Russian tabloid publications between 02 and 07 April, all discrediting Altimo and Alfa Group.

Among the twelve attachments to the letter was an email dated April 10, 2008, purportedly authored by plaintiff Bruce Marks and addressed to a "garda-world.com" email address. The email stated:

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> Craig:
>
> I am not impressed with Lobbynet's PR attempts in Russia. Their three articles to date have clearly not had the desired impact. It is obvious that they have chosen media which lacks both integrity and the ability to impact.
>
> Please inform them that I will withhold payment as per our original contract until I see some positive results and show them to Telenor.
>
> I wait to hear how they intend to rectify the situation.

Also attached was an email dated August 28, 2008, purportedly from Stuart Lessor of PBN Co., which stated in part:

> Alfa proactively used AB to a) get lobbying contacts in UK and elsewhere; (b) as shield against media accusations; c) as link to investment banks. They never work, but their names do. As you are well aware, Bruce reports XX is also impressed by the composition of the AB, apparently acquainted with one of its U.S. fellows.

Defendant Financial, on behalf of Crown and Altimo, distributed copies of the Releases to "media worldwide" on November 12, 2008, the same day they were sent to

Telenor. On the following day, an article entitled "Alfa Group is possessed by spy mania" (the "Article") was published by three globally-accessible Russian media websites. Written in the Russian language and Cyrillic alphabet, the Article as translated into English referenced plaintiffs as follows:

> Altimo confirms that in March of 2008 the law firm of Marks and Sokolov at Telenor's request initiated a number of publications in Russian mass media concerning the death of one of the founders of a mobile operator Megafon, Leonid Rozhetskin who disappeared in March of 2008 and possible Alfa Group's involvement [sic] in this matter.

According to plaintiffs, all representations concerning them in the Releases and the Article are entirely false. As a result, they "have suffered harm in Pennsylvania in the form of damage to their reputations and may lose business and potential business opportunities; in addition, Marks has suffered emotional distress, mental anguish, and humiliation in Pennsylvania." Plaintiffs now theorize that defendants circulated the defamatory Releases in retaliation for plaintiffs' participation in *Norex Petroleum Limited v. Access Industries, Inc., et al.*, Civ. A. No. 02-1499 (S.D.N.Y.), an ongoing case in which the plaintiff, Norex, is represented by Marks & Sokolov. Norex alleges that the defendants, who include Crown, conspired to take control of an oil company owned by Norex in Russia through fraud, corruption of court proceedings, bribery,

money laundering, and extortion. The lawsuit was dismissed for lack of subject matter jurisdiction in 2007 and is currently on appeal.

III.

A federal district court sitting in diversity may assert personal jurisdiction over a nonresident of the state in which the court sits only to the extent authorized by the law of that state. Fed. R. Civ. P. 4(k)(1)(A). Pennsylvania law provides for jurisdiction coextensive with that allowed by the Due Process Clause of the Constitution. 42 Pa. Cons. Stat. Ann. § 5322(b). As a result, we must determine whether an exercise of personal jurisdiction comports with federal law.

Two bases exist upon which a federal district court may exercise personal jurisdiction over a nonresident defendant: "General jurisdiction exists when a defendant has maintained systematic and continuous contacts with the forum state. Specific jurisdiction exists when the claim arises from or relates to conduct purposely directed at the forum state." *Marten*, 499 F.3d at 296 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-15, 104 S. Ct. 1868, 80 L. Ed. 2d 404 nn.8-9 (1984)). The complaint does not allege that defendants maintain systematic and continuous contacts with the forum state, Pennsylvania. Thus, we clearly lack general jurisdiction over them.

Under the Due Process Clause, we may exercise specific jurisdiction only over defendants who have

"certain minimum contacts . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945) (internal quotation omitted). A parallel inquiry is whether the defendant's contacts with the forum state are such that "he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980).

In *Calder v. Jones*, the Supreme Court addressed whether a court could exercise specific personal jurisdiction over non-resident defendants charged with commission of intentional torts whose effects were felt in the forum state. 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984). The plaintiff, an actress residing in California, had brought a defamation suit in California state court against a tabloid editor and reporter, both citizens of Florida and employees of the *National Enquirer*, a Florida corporation. The Court emphasized that: (1) the story "concerned the California activities of a California resident," (2) it "was drawn from California sources," (3) the brunt of the harm to plaintiff's reputation was suffered in California, and (4) the *National Enquirer* had its largest circulation in California. *Id.* at 788-90. On that basis it concluded that "California is the focal point both of the [allegedly defamatory] story and of the harm suffered." *Id.* at 789. As a result, the exercise of personal jurisdiction over defendants was consistent with due process.

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Our Court of Appeals expounded upon *Calder* in *IMO Indus., Inc. v. Kiekert AG*, a case in which IMO, a multinational corporation located in New Jersey, sued Kiekert, a German corporation, in New Jersey district court. 155 F.3d 254 (3d Cir. 1998). The complaint alleged that Kiekert had committed a variety of business torts while attempting to prevent the sale of IMO's Italian subsidiary to one of Kiekert's competitors in France. Specifically, Kiekert had sent letters threatening legal action to an IMO affiliate in New York, which were subsequently sent to IMO in New Jersey. Kiekert had also made similar representations during telephone calls placed by IMO in New Jersey. IMO further established that Kiekert was aware of the fact that any damages caused by a collapse of the deal would be felt primarily by IMO in New Jersey.

Judge Becker, writing for the court, rejected the contention that *Calder* permitted jurisdiction simply because "the harm caused by the defendant's intentional tort is primarily felt within the forum." *Id.* at 265. Instead, he formulated the *Calder* test as requiring that:

> (1) the defendant committed an intentional tort;
>
> (2) the plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of that tort; and

> (3) the defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity.

Id. at 265-66. Applying that test, the court concluded that although some of Kiekert's communications had foreseeably reached IMO in New Jersey, and the harm had been suffered there, those facts alone were "not sufficient to overcome the clear implication from the surrounding facts that New Jersey was not the focus of the dispute." *Id.* at 268. Consequently, because Kiekert had not "expressly aimed its tortious conduct at the forum," jurisdiction did not lie. *Id.*

Our Court of Appeals recently confirmed that the same rigorous standard applies to defamation suits in *Marten v. Godwin.* 499 F.3d 290 (3d Cir. 2007). The plaintiff, Marten, a resident of Pennsylvania, was a former participant in an internet-based correspondence degree program offered by the University of Kansas. He had been accused of plagiarism by two of his professors, both residents of Kansas, and subsequently expelled. Marten brought suit in this district, alleging that the accusations against him constituted defamation under state law. Defendants, who had not made statements or sent materials to anyone in Pennsylvania other than Marten himself, moved to dismiss for lack of personal jurisdiction. After discovery, the district court granted summary judgment in favor of the defendants on that basis.

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For purposes of review the Court of Appeals treated the allegations of Marten's complaint as true and considered the case as having been dismissed pursuant to Rule 12(b)(2). *Id.* at 295 n.2. The court accepted Marten's allegations that the defendants knew he was a resident of Pennsylvania and knew that the brunt of the harm to his reputation from a wrongful allegation of plagiarism would occur in Pennsylvania. It concluded, however, that Marten had not alleged the "specific facts" or "specific activity" showing a "deliberate targeting" of the forum state. *Id.* at 298 (citing *IMO*, 155 F.3d at 266). The panel observed as follows:

> The effects test and traditional specific jurisdiction analysis are different, but they are cut from the same cloth. Just as the standard test prevents a defendant from being haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, the effects test prevents a defendant from being haled into a jurisdiction solely because the defendant intentionally caused harm that was felt in the forum state if the defendant did not expressly aim his conduct at that state.

Id. at 297 (internal quotations and citations omitted). On the facts alleged, Marten had shown "only that defendants harmed him while he happened to be residing in Pennsylvania." *Id.* at 299; *see also Remick v. Manfredy*, 238 F.3d 248 (3d Cir. 2001). The court affirmed the dismissal of Marten's suit on the basis of lack of personal jurisdiction.

District courts have likewise dismissed defamation claims for failure to satisfy the effects test, including where, as here, the situation is complicated by "the added wrinkle of the internet." *Gorman v. Jacobs*, 597 F. Supp. 2d 541, 547 (E.D. Pa. 2009). In *Gorman*, the plaintiff, a podiatrist practicing in Pennsylvania, sued three fellow doctors, non-residents of Pennsylvania, for defamation based on their comments on an online forum that was accessible to the general public. The defendants had encouraged readers to report the plaintiff's alleged ethical violations to Pennsylvania-based and national medical associations. *Id.* at 543.

Addressing defendants' Rule 12(b)(2) motion, Judge Dalzell concluded that the defendants had directed their comments at a national audience rather than a local one. *Id.* at 549-51; *see also English Sports Betting, Inc. v. Tostigan*, Civ. A. No. 01-2202, 2002 U.S. Dist. LEXIS 4985, 2002 WL 461592, at *3 (E.D. Pa. Mar. 15, 2002). He observed that "[s]imply (a) knowing that the plaintiff is in the forum state, (b) posting negative statements about the plaintiff's forum-related activities, and (c) referring to the forum in one's writing will not suffice to satisfy the *Calder* effects test." *Id.* at 548. Because the plaintiff had failed to show that the defendants had expressly aimed their comments into the forum of Pennsylvania, the case was dismissed.[2]

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2. Notable appellate decisions from other circuits have produced similar results. *See Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002); *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002).

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For present purposes, we accept as true that the Releases in issue here were defamatory and that defendants distributed those materials to "media worldwide." We also assume based on plaintiffs' complaint that defendants were aware of plaintiffs' offices in Pennsylvania, Russia, and the Ukraine, and of plaintiffs' substantial client base in Russia. Finally, we credit the assertion that plaintiffs "have suffered harm in Pennsylvania in the form of damage to their reputations and may lose business and potential business opportunities."

The first *Calder* element will always be satisfied in cases where, as here, the plaintiff sufficiently alleges that the defendant committed an intentional tort. Before considering the second element, however, we are instructed to determine whether the plaintiff has satisfied the third element, which requires that the defendant "expressly aimed" defendant's tortious conduct at the forum state. *Id.* at 266.

There is no question that the Releases in issue here had no readily apparent connection with Pennsylvania. They summarized the purported wrongdoing orchestrated by Telenor, a Norwegian company, against defendant Altimo, a holding company incorporated in the British Virgin Islands and having business interests in Russia. Although the documents implicated plaintiffs in Telenor's wrongdoing, they did not mention plaintiffs' status as residents of Pennsylvania and instead described Marks & Sokolov as "a legal company operating in the UK, U.S. and Russia." Nor did the

Releases suggest that any of the described wrongdoing had occurred in the Commonwealth. To the contrary, they stated that Marks & Sokolov had "initiated a number of publications in Russian mass media."

There are also no allegations that the Releases were specifically directed at Pennsylvania through the method by which they were distributed. In plaintiffs' own words, the Releases were disseminated to "media worldwide," which indicates that the comments were directed, if anywhere, to a global audience. As noted earlier, the district court in *Gorman* found that that fact alone warranted dismissal of the complaint for lack of personal jurisdiction. 597 F. Supp. 2d at 549-51; *see also English Sports Betting, Inc.*, 2002 U.S. Dist. LEXIS 4985, 2002 WL 461592, at *3.

The Releases were later summarized in an Article carried by three Russian media websites which again did not mention Pennsylvania. Although the relevant websites were technically accessible in Pennsylvania, those sites and the Article itself were written in the Russian language using the Cyrillic alphabet. Our Court of Appeals has recognized that when a publication is written entirely in a foreign language, it weighs heavily against a finding that the author intended to aim that content at an American audience. *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454 (3d Cir. 2003); *see also Noonan v. Winston Co.*, 135 F.3d 85, 91 (1st Cir. 1998). On these facts it is plain that, as in *IMO*, "the focus of the dispute" is overseas, rather than in Pennsylvania, the forum state. 155 F.3d at 268.

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Plaintiffs cite *Dudnikov v. Chalk & Vermilion Fine Arts.*, 514 F.3d 1063 (10th Cir. 2008), for the proposition that personal jurisdiction exists here. In that case, the defendants had disrupted a Colorado plaintiff's internet auction by filing a complaint in California with eBay, the auction website's proprietor. Applying the effects test, the panel found sufficient evidence that "[d]efendants' express aim in acting was to halt a Colorado-based sale by a Colorado resident," and consequently, "neither the lack of defendants' physical presence in Colorado nor the fact that they used a California-based entity to effectuate this purpose" precluded an exercise of jurisdiction. *Id.* at 1076. Plaintiffs argue that as in *Dudnikov*, defendants here simply aimed an intentional tort at the forum state in a roundabout manner.

Even assuming our Court of Appeals would adopt the reasoning of *Dudnikov*, that decision is inapposite. The sole effect of the action taken by the *Dudnikov* defendants in California was to interfere with the plaintiff's auction in Colorado. The defendants had thereby aimed their conduct into Colorado, which is where the heart of the dispute, the contested eBay auction, was in fact taking place. Here, by contrast, plaintiffs allege only that defendants intended "to achieve publication in Russian speaking media accessible to Pennsylvania and the world in order to destroy Plaintiffs' Pennsylvania based practice which relates to Russia and Ukraine." That allegation merely assumes the fact to be proved. It is not an allegation of "specific activity" or "specific fact" showing a "deliberate targeting" of plaintiffs' Pennsylvania office as opposed

to their law offices in Russia and the Ukraine. *IMO*, 155 F.3d at 266; *Marten*, 499 F.3d at 298. Nor have plaintiffs included any other suitably precise allegations in their complaint which demonstrate that defendants expressly aimed their conduct at Pennsylvania, a forum some 4,700 miles away.

As in *IMO*, *Marten*, and *Gorman*, plaintiffs have failed to satisfy the third element of the *Calder* test. As a result, they have not carried their burden of demonstrating that sufficient minimum contacts exist for us to exercise specific jurisdiction over defendants. *Burger King Corp.*, 471 U.S. at 474. Accordingly, we will grant the motion of defendants to dismiss the complaint in its entirety for lack of personal jurisdiction under Rule 12(b)(2) of the Federal Rules of Civil Procedure. We do not reach the question whether the complaint fails to state a claim upon which relief can be granted.

Appendix B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION

NO. 08-5651

BRUCE S. MARKS, et al.

v.

ALFA GROUP, et al.

ORDER

AND NOW, this 25th day of June, 2009, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of defendants Altimo Holdings & Investments Ltd., Crown Finance Foundation, and Financial Dynamics, Ltd., to dismiss the complaint under Rule 12(b)(2) of the Federal Rules of Civil Procedure is GRANTED; and

(2) the complaint of plaintiffs Bruce S. Marks and Marks, LLC, doing business as Marks & Sokolov, LLC, is DISMISSED for lack of personal jurisdiction.

BY THE COURT:

/s/ Harvey Bartle III
C.J.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING FILED APRIL 5, 2010

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-2964

BRUCE S. MARKS; MARKS, LLC, d/b/a MARKS & SOKOLOV, LLC,

Appellants

v.

ALFA GROUP, a/k/a CROWN FINANCE FOUNDATION; ALTIMO HOLDINGS & INVESTMENT LTD; FINANCIAL DYNAMICS LTD

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge,* SLOVITER, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, ROTH,* and TASHIMA,** *Circuit Judges*

---

* Hon. Jane R. Roth, Senior Circuit Judge, as to panel rehearing only.

** Hon. A. Wallace Tashima, Senior Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation, as to panel rehearing only.

Appendix C

The petition for rehearing filed by Appellants Bruce S. Marks; Marks, LLC, d/b/a Marks & Sokolov, LLC, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en bane, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: April 5, 2010

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(2)

No. 10-57

Supreme Court, U.S.
FILED
AUG 9 - 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BRUCE MARKS AND MARKS, LLC
d/b/a MARKS & SOKOLOV, LLC,

Petitioners,

v.

ALFA GROUP a/k/a CROWN FINANCE FOUNDATION,
ALTIMO HOLDINGS & INVESTMENTS LTD.,
and FINANCIAL DYNAMICS LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT FINANCIAL DYNAMICS LTD. AND JOINDER IN BRIEF IN OPPOSITION OF RESPONDENTS ALTIMO HOLDINGS & INVESTMENTS LTD. AND CROWN FINANCE FOUNDATION

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QUESTION PRESENTED

Financial Dynamics Ltd. joins in the Question Presented as submitted in the Brief in Opposition of Altimo Holdings & Investments Ltd. and Crown Finance Foundation.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent Financial Dynamics Ltd. makes the following disclosure:

Respondent Financial Dynamics Ltd. is ultimately wholly owned by FTI Consulting, Inc., a publicly-held corporation.

INTRODUCTORY STATEMENT

Respondent Financial Dynamics Ltd. ("FD") hereby joins in the Brief in Opposition of its Co-Respondents, Altimo Holdings & Investments Ltd. ("Altimo") and Crown Finance Foundation ("CFF") and submits its own Brief in Opposition to the Petition for a Writ of Certiorari of Petitioners Bruce Marks ("Marks") and Marks, LLC d/b/a Marks & Sokolov, LLC ("M&S") (together "Petitioners").

STATEMENT OF THE CASE

A. Factual Background

FD joins in the Statement of the Case of Altimo and CFF and supplements that Statement with the following additional facts related to FD. FD is a business and communications consultancy organized under the laws of England and Wales, with its principal place of business in London. A0143.[1] FD has no office in Pennsylvania and pays no taxes there. A0143. FD owns no property and neither conducts nor is qualified to conduct business in Pennsylvania. A0143-144. FD does not provide its communications consultancy services to any clients in Pennsylvania and does not advertise its services there. A0144. The employees, records and offices of FD are all located outside Pennsylvania. A0144. FD does not have any ownership interest in any company incorporated or having a principal place of business in Pennsylvania. A0144. FD is a wholly-owned subsidiary of a U.S. corporation, FTI Consulting, Inc., a Maryland corporation with its principal place of business in

1. In this brief, "A" refers to the Joint Appendix filed with the United States Court of Appeals for the Third Circuit.

Baltimore. A0144. FD is a separate company and separate legal entity within the FTI group, with its own profit and loss account, and exercises individual control over its employees, whose salaries are paid by FD. A0144.

The Complaint alleges a single tortious action by FD: "FD disseminated the Releases *to the world-wide media* on behalf of Altimo, Alfa, Kosogov, and Fridman." A0041 (emphasis added). As defined in the Complaint, the "Releases" consisted of a press release, a letter from Altimo Chairman Kosogov to Telenor, a summary memorandum, and various attachments. A0043. The alleged defamatory statements were contained only in the summary memorandum and attachments. A0044-045.

The jurisdictional discovery provided by FD delineated the limited circulation by FD of the allegedly defamatory materials. While FD provided the admittedly non-defamatory press release and Kosogov letter only to media outlets in England and Germany, the documents claimed to contain defamatory statements were provided by FD solely to the Legal Department of the *Financial Times* in London, subject to a non-disclosure agreement. A0179-181. There is no evidence that the *Financial Times* further disseminated the documents. A0180.

B. Proceedings Below

FD joins in the recitation of the Proceedings Below of Altimo and CFF.

REASONS FOR DENYING THE PETITION

FD adopts the legal arguments as stated by Altimo and CFF and supplements those legal arguments with the following additional reasons for denying the petition.

In view of FD's lack of minimum contacts with the forum and absence of any assets in Pennsylvania, subjecting FD to jurisdiction in Pennsylvania does not comport with "traditional notions of fair play and substantial justice." *Marten v. Godwin*, 499 F.3d 290, 296 (3d Cir. 2007) (citation omitted). Moreover, FD's dissemination of the allegedly defamatory materials to the legal department of a single media representative in London, A0180, does not support Petitioners' contention that FD's allegedly tortious conduct, "disseminat[ing] the Releases *to the world-wide media*," A0041 (emphasis added), was expressly aimed at Pennsylvania or that Petitioners felt the brunt of the harm in this forum. *IMO Indus. v. Kiekert AG*, 155 F.3d 254, 265-66 (3d Cir. 1998). To the contrary, both the District Court and the Third Circuit Court of Appeals properly held that the Respondents failed to satisfy the "expressly aimed" prong of the "effects test" espoused in *Calder v. Jones*, 465 U.S. 783 (1984).

Moreover, Petitioners' efforts to manufacture a split between the Court of Appeals for the Third Circuit and the other Courts of Appeals should be ignored. On the facts presented in the Complaint, every Court of Appeals would adhere to this Court's holding in *Calder*, where Justice (later Chief Justice) Rehnquist ruled for a unanimous Court that sufficient minimum contacts to satisfy the requirements of due process existed because the allegedly libelous story concerned the California

activities of a California resident whose television career was centered in California, the article was drawn from California sources, and the brunt of the harm in terms of both emotional distress and professional reputation was suffered in California. *Id.* at 788-89. "In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the 'effects' of their Florida conduct in California." *Id.* at 789 (citations omitted).

Petitioners have not and can not make any such claims about the conduct of Financial Dynamics or other Respondents in this case. The allegedly libelous material does not concern Pennsylvania activities, does not draw on Pennsylvania sources, was not published in Pennsylvania, and Pennsylvania is not the focal point of the story. Rather, the allegedly defamatory material was purportedly posted on a Russian web site, in the Russian language and the Cyrillic alphabet, by a person or persons not associated with any of the Respondents. To allow a United States District Court sitting in Pennsylvania to exercise personal jurisdiction over an English company having no other connection with Pennsylvania in such circumstances would offend all concepts of minimum contacts and due process. *Id.* at 788; *see also Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

CONCLUSION

For the foregoing reasons and those set forth in the Brief in Opposition of Altimo Holdings & Investments Ltd. and Crown Finance Foundation, the Petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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(3)

No. 10-57

IN THE

Supreme Court of the United States

BRUCE MARKS AND MARKS, LLC
D/B/A MARKS & SOKOLOV, LLC,

Petitioners,

v.

ALFA GROUP A/K/A CROWN FINANCE FOUNDATION,
ALTIMO HOLDINGS & INVESTMENT LTD.,
AND FINANCIAL DYNAMICS LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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August 9, 2010

Question Presented

Does the Due Process Clause of the 14th Amendment to the U.S. Constitution support jurisdiction over foreign defendants in a defamation action when the only connections to the forum are that the forum is one of the places in which plaintiffs are known to reside and that residents of the forum can access the allegedly defamatory statements on the Internet?

Rule 29.6 Statement

Pursuant to Supreme Court Rule 29.6, Respondents submit the following corporate information:

Respondent Crown Finance Foundation, incorrectly identified for docketing purposes as "Alfa Group", does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

Respondent Altimo Holdings & Investment Ltd. has the following parent corporations: CTF Holdings Limited and Crown Finance Foundation. No publicly held company directly owns 10% or more of its stock.

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Introduction

Petitioners ask this Court to decide whether, "regardless" of other facts, the Due Process Clause of the 14th Amendment supports specific jurisdiction over a foreign defendant based solely on its having committed an "intentional tort[]" (alleged defamation) that "individually target[s] forum residents with the intent of harming them within the forum." (Petitioners' Petition for Writ of Certiorari (the "Petition" or "Pet.") at ii.) Petitioners' use of the phrase "individually target" appears to signify nothing in a defamation case: by definition, defamation "targets" the person defamed. Thus, the Petition effectively asks the Court to impose a rule that there is always personal jurisdiction in a defamation case when the plaintiff is known to reside (at least in part) in the forum. The Petition should be denied because there is no basis for such a rule in this Court's precedent, or in the decisions of the courts of appeals that petitioners cite.

In the decision below, the United States Court of Appeals for the Third Circuit affirmed the decision of the District Court for the Eastern District of Pennsylvania (the "District Court"), dismissing the case for lack of personal jurisdiction. Both courts held that petitioners failed to allege facts sufficient to establish personal jurisdiction pursuant to Pennsylvania's long-arm statute, which extends to the limits of the Due Process Clause of the 14th Amendment.

Bruce S. Marks and Marks, LLC, d/b/a Marks and Sokolov, LLC ("M&S"),[1] alleged that Altimo Holdings & Investments Ltd. ("Altimo") and Crown Finance Foundation ("CFF") defamed them and that jurisdiction was proper in Pennsylvania.[2] The District Court and the Third Circuit held that there was no jurisdiction in Pennsylvania. It is undisputed that there is no general jurisdiction because both Altimo and CFF are organized under foreign law, A0148, A0156,[3] and neither company has an office, owns property or conducts business in Pennsylvania, A0003.

The courts below correctly held that there is no specific jurisdiction because the statements at issue were neither made in nor expressly aimed at Pennsylvania. Petitioners alleged only that respondents made defamatory statements about them (not involving or referring to Pennsylvania) to the Norwegian company Telenor ASA ("Telenor"), to Russian journalists, and to certain persons in the United Kingdom, and that Russian-language websites unconnected to respondents subsequently

---

[1] The caption on the Petition as well as that used by the Third Circuit incorrectly spells Sokolov as Solokov. Instead we use the caption used by the Complaint and the District Court.

[2] CFF, "incorrectly identified for docketing purposes as 'Alfa Group,'" *see* A0001, is lumped together with Altimo and Financial Dynamics in the complaint, but no specific allegation is made with respect to any activity of CFF. For purposes of clarity, Alfa Group is not "also known as" CFF. Alfa Group is not an entity, but is a collection of affiliated companies, which includes CFF. A0156.

[3] In this brief, "A" refers to the Joint Appendix filed with the United States Court of Appeals for the Third Circuit.

reported on respondents' statements (and, in the same article, on Telenor's rebuttals). Thus, Pennsylvania was not the "focal point" of the alleged defamation.

Petitioners premise jurisdiction on their assertions that (i) respondents' statements were intended to harm petitioners, who reside and do business in Pennsylvania (and in Russia and Ukraine), and (ii) reports of the statements were accessible (albeit through Russian-language websites unconnected to respondents) in Pennsylvania (and worldwide) on the Internet. Under this Court's decision in *Calder v. Jones*, 465 U.S. 783 (1984), however, those allegations are insufficient to give rise to personal jurisdiction in a forum with which the defendant has no connection.

Calder involved a libel action in which this Court was asked to resolve whether a court in California could constitutionally exercise jurisdiction over two journalists based on the "effects" of their Florida conduct in California. *Id.* at 789. The plaintiff, Shirley Jones, was a resident of California who sued in California state court. *Id.* at 784-85. The defendants were each based in Florida. *Id.* at 785-86. In finding jurisdiction over the individual defendants appropriate, this Court relied on four facts: (1) that the article written and published by the defendants "concerned the California activities of a California resident"; (2) that the article "was drawn from California sources"; (3) that the "brunt of the harm" to Jones' reputation occurred in California; and (4) that "the National Enquirer [the publication in which the article appeared] has its largest circulation" in California. *Id.* at 788-90. In sum, this

Court held that "California is the focal point both of the story and of the harm suffered." *Id.* at 789.

A key element of *Calder* is that the allegedly wrongful conduct be "expressly aimed" at the forum, not just the plaintiff. *Id.* at 790, 789 (noting that the alleged tortious conduct was "expressly aimed at *California*" (emphasis added)); *see also id.* at 788 ("In judging minimum contacts, a court properly focuses on 'the relationship among the defendant, *the forum*, and the litigation.'" (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)) (emphasis added)). In *Calder*, the Court determined that the alleged defamation was "expressly aimed" at California based on several distinctive facts: the publication for which the allegedly defamatory statements were written, the National Inquirer, had "its largest circulation" in California, *id.* at 789-90; "[t]he allegedly libelous story concerned the California activities of a California resident," *id.* at 788; the story "impugned the professionalism of an entertainer whose television career was centered in California," *id.*; and "[t]he article was drawn from California sources," *id.*

There is no corresponding nexus to Pennsylvania in this case. Here, the publication by respondents of the allegedly defamatory statements was in Norway, Russia and the United Kingdom, and the ensuing publication by Russian-language websites was unconnected to respondents; the statements at issue concerned activities in Russia, Norway and Ukraine; petitioners' professional interests, as an international law practice, focus on disputes arising in Russia and Ukraine; and there is no mention of Pennsylvania, and no suggestion that

Pennsylvania sources were used, in any of the statements at issue.

The decision below denying jurisdiction is consistent with *Calder*, and with the courts of appeals decisions following *Calder* that petitioners cite. The petition should, therefore, be denied.

Statement of the Case

A. Factual Background

Petitioner Marks is a resident of Pennsylvania, and he is the sole partner in petitioner Marks, LLC, a Philadelphia law firm with seven attorneys. Together with MS Ltd., a Moscow, Russia law firm with six attorneys, and MSB, Ltd, which maintains an office in Kiev, Ukraine with three attorneys, Marks, LLC does business as M&S. App. 9a; A0002, A0162-64, A0212. M&S describes itself as a "US–Russian law firm," A0167, and petitioners' website does not distinguish among the three offices and holds each out to be an office of M&S. A0162-164, A0166-170. As petitioners' website explains, "the lawyers of Marks & Sokolov function as an integrated team." A0162. M&S's practice focuses in part on "representing persons harmed by fraud or corruption in Russia or Ukraine by finding means to bring their claims in the United States." App. 9a; A0041 (Complaint ("Cpl.") ¶ 20.).

This case involves a single allegation of tortious conduct arising from a press release, accompanied by a letter, a supporting memorandum, and several attachments (together, the "Releases"). Petitioners allege that Altimo issued the Releases; it addressed

the letter to the Chairman of the Board of Telenor; and it provided copies of the Releases to Financial Dynamics Ltd. ("FD") (Altimo's public relations advisor),[4] and to eight Russian journalists in Russia. A0043 (Cpl. ¶¶ 29-30), A0176. Petitioners do not allege that the Releases were circulated in Pennsylvania or accessible to Pennsylvania residents.

Soon after Altimo issued the Releases, three Russian Internet sites, which are not connected to respondents, posted identical articles (the "Articles"), written in Russian, discussing "[t]he conflict between Altimo and Telenor . . . regarding [a] business in Ukraine" and efforts by each company to influence Russian and United Kingdom media. A0048 (Cpl. ¶ 56); A0123-37 (Cpl. Ex. D, Translation). The Articles, which are the only basis for linking the defamation claim to Pennsylvania, do not mention Pennsylvania, and they describe (with a rebuttal from Telenor) only one statement made by Altimo that relates to petitioners (naming only the international law practice, M&S, not Marks):

> "Altimo confirms that in March of 2008 the law firm of Marks and Sokolov at Telenor's request initiated a number of publications in Russian mass media concerning the death of one of the founders of a mobile

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[4] FD provided these documents to a member of the legal department at the Financial Times of London, subject to a non-disclosure agreement. FD did not disclose or provide the Releases to anyone else, and there is no evidence that the Financial Times further disseminated the Releases. A0180.

> operator Megafon, Leonid Rozheckin who disappeared in March of 2008 and possible Alfa Group's [sic] involvement in this matter."

A0125, A0130, A0135 (Cpl. Ex. D, Translation). This sentence, found in the three Russian-language, Russian website Articles, is the only allegedly defamatory statement petitioners claim was accessible to Pennsylvania residents. A0048 (Cpl. ¶¶ 56-58), A0051 (Cpl. ¶ 69). Petitioners characterize this one statement in Russian on the Internet as a "world-wide media campaign" to defame them, in retaliation for petitioners' representation of Telenor, a Norwegian company, in a case filed seven years earlier in the Southern District of New York "over Russian and Ukrainian telecommunications assets." A0038 (Cpl. ¶ 4), A0039 (Cpl. ¶10), A0046 (Cpl. ¶ 48); Pet. at 2-3.

There is no allegation that anyone in Pennsylvania, other than petitioners, accessed the Releases or the Articles. There is no allegation that the Releases or the Articles referenced Pennsylvania or any Pennsylvania-related activity. There is no allegation that respondents in authoring the Releases, or the Russian-language websites unconnected to respondents in posting the Articles on the Internet, relied on any source in Pennsylvania. There is no allegation that the Releases or the Articles were circulated among any Pennsylvania media or reproduced in any form by a Pennsylvania publication. Petitioners have even conceded that the Articles were aimed at "Russian readers." (Brief for Plaintiffs-Appellants at 9, 10

n.2., *Marks v. Alfa Group*, No. 09-2964 (3rd Cir. Mar. 12, 2010).)

Therefore, petitioners' case turns on whether allegedly defamatory statements made by foreigners to foreigners regarding disputes and conduct focused on Russia, Norway and Ukraine are subject to jurisdiction in Pennsylvania solely because (i) the plaintiff is known to reside and do business in part in Pennsylvania, and (ii) the statements were subsequently described by Russian-language websites unconnected to respondents that were accessible in Pennsylvania. A0048 (Cpl. ¶ 58).

B. The Proceedings Below

1. The District Court's Decision

The District Court was required to accept, and did accept, petitioners' allegations. App. 20a. In dismissing this case, the District Court accepted allegations that respondents distributed defamatory materials to "media worldwide"; that respondents were aware of petitioners' offices in Pennsylvania, Russia and Ukraine; that petitioners had a "substantial client base in Russia"; and that petitioners "may lose business and potential business opportunities" in Pennsylvania as a result of the defamatory statements. App. 20a.

The District Court concluded that these allegations were insufficient to give rise to personal jurisdiction over respondents in Pennsylvania. App. 22a-23a. Relying on the principles set forth by this Court in *Calder*, the District Court explained the

three crucial elements that gave rise to jurisdiction over the out-of-state resident in that case:

> "(1) the defendant committed an intentional tort;
>
> (2) the plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of that tort; and
>
> (3) the defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity."

App. 16a-17a (*citing IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 265-66 (3d Cir. 1998)).

The District Court found that petitioners had failed to satisfy the third of these prongs, holding that petitioners failed to "include[] any . . . suitably precise allegations in their complaint which demonstrate that defendants expressly aimed their conduct at Pennsylvania." App. 23a. If anything, the court observed, the allegations in the complaint showed that respondents' statements "were directed . . . to a global audience," as opposed to an audience in Pennsylvania, or even the United States. App. 21a. The court also recognized an additional circumstance tending to negate jurisdiction: the fact that the sole form in which the alleged defamatory statements were alleged to have reached Pennsylvania was via "Russian media websites which again did not mention Pennsylvania" and

which "were written in the Russian language using the Cyrillic alphabet." App. 21a.[5] The District Court observed that petitioners' allegation that respondents intended "to achieve publication in Russian speaking media accessible to Pennsylvania and the world in order to destroy Plaintiffs' Pennsylvania based practice which relates to Russia and Ukraine" was conclusory, lacking any specific basis for inferring "a 'deliberate targeting' of plaintiffs' Pennsylvania office as opposed to their law offices in Russia and Ukraine." App. 22a-23a. Such allegations, the District Court held, were not sufficient to show respondents "expressly aimed" their tortious conduct at Pennsylvania, "a forum some 4,700 miles away" from where the Articles were posted on the Internet. App. 23a.

2. The Third Circuit's Decision

Petitioners appealed this dismissal to the Third Circuit. In a brief unpublished decision, the Third Circuit applied *Calder* and affirmed the District

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[5] As the District Court concluded, even had respondents been responsible for posting the Russian-language Articles on the Internet, which they were not, this would not demonstrate that respondents expressly aimed their conduct at Pennsylvania. App. 21a ("[W]hen a publication is written entirely in a foreign language, it weighs heavily against a finding that the author intended to aim that content at an American audience") (*citing Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454 (3d Cir. 2003) (finding, in a trademark infringement case, that defendant's websites were not designed or intended to reach customers in New Jersey, since, *inter alia*, websites were entirely in Spanish), and *Noonan v. Winston Co.*, 135 F.3d 85, 91 (1st Cir. 1998) (noting that an allegedly defamatory advertisement with French text and a French phone number suggests it was created for a French audience).

Court's ruling, observing that petitioners did not allege that respondents made any effort to circulate their statement in Pennsylvania; that the statement did not specifically reference petitioners' practice of law in Pennsylvania; and that the Articles "were published only by Russian news organizations in the Russian language." App. 6a. In sum, the Third Circuit noted, petitioners' allegations supplied no basis "for a finding that defendants 'expressly aimed' their conduct at the forum." App. 6a. Consequently, the Third Circuit affirmed the District Court's dismissal. The Third Circuit denied petitioners' request for a rehearing en banc. App. 25a-26a.

Reasons for Denying the Petition

I. The Decision Below Followed and Correctly Applied *Calder*

The dismissal of petitioners' defamation action (and the Third Circuit authority upon which it was based) was consistent with and correctly followed this Court's decision in *Calder*. For this reason, this Court should deny the petition.

This case involves nothing more than a straightforward application of *Calder*, and, therefore, does not warrant this Court's review. That the Articles were available on the Internet instead of a more traditional publication has no bearing on the legal question petitioners seek to present, Pet. at ii, and does nothing to alter the long-standing principles that this Court has set forth governing when jurisdiction may be exercised over a foreign defendant.

Here, the Third Circuit correctly affirmed dismissal, following *Calder*, given the following key facts: (1) petitioners "[did] not allege that defendants attempted to have their news release published in Pennsylvania"; (2) "[n]either the news release nor the articles it spawned refer to Pennsylvania or [petitioners'] practice [of law] there"; and (3) petitioners have not alleged that respondents "distributed their news release to specific media organizations based in Pennsylvania." App. 5a-6a.

Petitioners contend that respondents intended to "achieve publication in Russian speaking media accessible to Pennsylvania and the world." A0048 (Cpl. ¶ 57). However, petitioners do not allege that respondents did anything to target a Pennsylvania audience; indeed, their allegations point to specific audiences—in Russia, Norway and Ukraine, and Russian speakers—that have no connection with Pennsylvania. Publication via "three . . . Russian language media websites" (A0048 (Cpl. ¶ 56), A0123-137 (Cpl. Ex. D)) is not conduct "expressly aimed" at Pennsylvania.

Even assuming that a description of Altimo's allegations, without endorsing them, by Russian websites—the sole means by which the allegations were accessible in Pennsylvania—was respondents' intent, such Russian language publication does not indicate an intent to target a Pennsylvania audience. Nor can "express aiming" at Pennsylvania be inferred from the content of the Articles, which related to events occurring in Russia, Norway and Ukraine. Nor do petitioners allege that anyone in Pennsylvania other than their own agents accessed the Articles.

In sum, all the indicia on which this Court relied in *Calder* to find that defamatory statements were aimed at California point away from Pennsylvania in this case. The decision below denying jurisdiction is, therefore, correct, and consistent with *Calder*. Thus, as the District Court found, none of petitioners' allegations is sufficient to establish that respondents "expressly aimed" their conduct at Pennsylvania, as was a critical fact in *Calder*.

II. There Is No Circuit Split That Warrants This Court's Review

When presented with the facts of this case, all Circuits would have resolved this case under their existing law in the same way as the Third Circuit. As a result, this case does not implicate a circuit split meriting this Court's review.

A. First Circuit

Petitioners' reliance on the First Circuit's decision in *Northern Laminate Sales, Inc. v. Davis*, 403 F.3d 14 (1st Cir. 2005), is misplaced. In that case, the alleged tortfeasor sent a bad check and other mail directly into the forum in which the plaintiff sought to subject him to specific jurisdiction. *Id.* at 19-20. As a result, jurisdiction was proper not just because the plaintiff suffered injury in the proposed forum, but because of defendant's direct and deliberate contacts with it. *Id.* at 25-26. The same cannot be said here as respondents had no contact with Pennsylvania or petitioners in the course of circulating their statement.

B. Fourth Circuit

Petitioners' reliance on the Fourth Circuit's holding in *First American First, Inc. v. National Association of Bank Women*, 802 F.2d 1511 (4th Cir. 1986), is also misplaced. In *First American First*, plaintiff alleged that defendant circulated letters both inside and outside plaintiff's home state, with the intent of "inflict[ing] the greatest injury upon [plaintiff] in the state in which he resided and conducted his business." *Id.* at 1517. Thus, jurisdiction in *First American First* was premised at least in part on direct and deliberate contacts with the forum. *Id.*

Petitioners' allegations also differ considerably from those made in *First American First*, because the plaintiff corporation in that case was organized under the laws of Virginia, the proposed forum, and its only office was located in Virginia. *Id.* Therefore the Fourth Circuit's conclusion that defendant's call for a boycott was inevitably aimed at and intended to cause injury in Virginia, *see id.*, is far more compelling than petitioners' allegations with respect to Pennsylvania. Because petitioners have offices in Pennsylvania, Russia and Ukraine, because petitioners allege that respondents intended to harm petitioners' "practice which relates to Russia and Ukraine," A0048 (Cpl. ¶¶ 57-58), and because respondents' statements concerned disputes focused in Russia, Norway and Ukraine, there is no basis here to infer that the target of respondents' conduct was Pennsylvania as opposed to Russia or Ukraine. That respondents' statements only reached Pennsylvania via Articles posted on Russian-language websites unconnected to respondents

further indicates that Pennsylvania was not the focal point of respondents' conduct.

Other decisions from the Fourth Circuit, including the Internet-related case of *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), *cert. denied*, 538 U.S. 1035 (2003), confirm that the Fourth Circuit's interpretation of the law is consistent with that of the Third Circuit. In *Young*, the Fourth Circuit held that a court in Virginia lacked jurisdiction over a Connecticut newspaper that published articles about the plaintiff, who was a warden of a Virginia prison. *See id.* at 258-59. The defamation action in *Young* involved the publication of articles in Connecticut that were also published on the Internet and accessible to residents of Virginia. *See id.* at 259-60. The Fourth Circuit held that publication on the Internet "did not manifest an intent to aim their websites or the posted articles at a Virginia audience", and that the lawsuit should have been dismissed for a lack of personal jurisdiction. *Id.* at 258-59. Nothing has happened since this Court's denial of certiorari in *Young* to warrant taking this case.

C. Seventh Circuit

Petitioners quote broad language from *Janmark, Inc. v. Reidy*, 132 F.3d 1200 (7th Cir. 1997), a copyright case. *Janmark* makes clear, however, that in order to sustain specific jurisdiction, at a minimum the forum must be the focal point of the plaintiff's injury. *See id.* at 1202-1203. Petitioners' allegations that Pennsylvania residents may have accessed the Articles, because they were "accessible on the Internet worldwide," A0051 (Compl. ¶ 69),

and that petitioners "may lose business and potential business opportunities" in Pennsylvania, A0051 (Cpl. ¶ 74), are insufficient to establish that Pennsylvania was, or was intended by respondents to be, the focal point of petitioners' alleged injuries, particularly in light of the facts that the Articles were written in Russian and available only on Russian websites. A0123-0137 (Cpl. Ex. D, Translation). Plainly, if petitioners were injured by defamation – if their reputation were harmed – that injury occurred primarily where people had access to and could read respondents' statements: in Russia and other predominantly Russian-speaking areas.

Moreover, since *Janmark* was decided, the Seventh Circuit has called into question the potentially broad implications of the decision. In *Tamburo v. Dworkin*, 601 F.3d 693 (7th Cir. 2010), *petition for cert. filed*, 10 U.S.L.W. 146 (U.S. July 7, 2010) (No. 10-61), the Seventh Circuit observed that the *Janmark* decision is difficult to reconcile with the Circuit's earlier decisions, such as *Wallace v. Herron*, 778 F.2d 391 (7th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986), insofar as "*Janmark* is understood as broadly authorizing personal jurisdiction wherever a tort victim is injured." *Tamburo*, 601 F.3d at 705. In upholding jurisdiction, *Tamburo* gave less emphasis to *Janmark*'s "broad language about *Calder*" and instead focused on the point that *Janmark* "ultimately considered the relationship between the allegedly tortious conduct and the forum state itself" in reaching its conclusion. *Id.* at 706.

Tamburo involved not just an allegation that defamatory material was posted on the Internet, but also that the defendant sent blast emails reciting the

plaintiffs' address in Illinois and urging readers to boycott plaintiffs' Illinois business. *Id.* at 697. Thus, this Court's decision on the pending petition for certiorari in *Tamburo* should have no bearing on this case. Tellingly, the Seventh Circuit has approvingly cited the Fourth Circuit's decision in *Young*, 315 F.3d 256, and has observed that "[i]n a case involving a stand-alone Internet-based defamation, *Calder* might require a showing that the defendant intended to reach forum-state readers." 601 F.3d at 707 n.10.

D. Eighth Circuit

In *Dakota Industries, Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384 (8th Cir. 1991), the court's finding of specific jurisdiction was supported by defendant's direct and calculated contacts with the forum. *See id.* at 1391. By comparison, the tortious conduct alleged in this case did not involve any deliberate contact with Pennsylvania.

Moreover, other Eighth Circuit authority, not cited by petitioners, confirms that there is no split between the Third and Eighth Circuits. In *Hicklin Engineering, Inc. v. Aidco, Inc.*, 959 F.2d 738, 739 (8th Cir. 1992), for example, the Eighth Circuit denied jurisdiction:

> "Assuming [plaintiff's] allegations to be true, [defendant] sent correspondence containing defamatory statements to several of [plaintiff's] customers and interfered with its business. None of the correspondence, however, was published in Iowa [the

> proposed forum]. Nor can we say that [defendant's] actions were targeted to have an effect in Iowa."

E. Ninth Circuit

Petitioners cite two Ninth Circuit trademark cases: *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316 (1998), and *Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d 1082 (2000). Neither addresses the application of *Calder* in the defamation context, and both cases recognize that *Calder* "cannot stand for the broad proposition that a foreign act with foreseeable effects in the forum state always gives rise to specific jurisdiction." *Bancroft*, 223 F.3d at 1087; *see also Panavision*, 141 F.3d at 1322.

Consistent with the decision below, *Bancroft* recognized that *Calder* requires "something more": "what the Supreme Court described as 'express aiming' at the forum state." 223 F.3d at 1087 (quoting *Calder*, 465 U.S. at 789); *accord Panavision*, 141 F.3d at 1322. *Bancroft* and *Panavision* thus proceeded from the same doctrinal starting point as the Third Circuit in this case and the other Circuits.

In applying the requirement of "something more" in the trademark context, *Bancroft* stated broadly that it is satisfied "when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state." 223 F.3d at 1087; *see also Panavision*, 141 F.3d at 1322. That broad statement in the context of trademark cases must, however, be viewed in light of facts emphasized in

the Ninth Circuit's opinions that contrast starkly with the present case. Both *Bancroft* and *Panavision* involved California plaintiffs whose activities, business interests and clientele were heavily focused in California,[6] in contrast to M&S's international law practice focused on Russia- and Ukraine-based disputes.

The broader statements in *Bancroft* and *Panavision* are also of doubtful authority even in the Ninth Circuit, at least insofar as petitioners seek to extend them beyond the trademark context. More recent Ninth Circuit authority clarifies that, even in cases of "individualized targeting," the focus of the analysis is whether the conduct was "expressly aimed" at the forum. For example, in *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004), the Ninth Circuit held that an Ohio car dealership had not "'expressly aimed' its intentional act [the placement of an advertisement in a locally-circulated Ohio newspaper that included a photograph of Arnold Schwarzenegger without his permission] . . . at California," *id.* at 806, despite the facts that defendant may have harmed Schwarzenegger in California and that defendant may have known that Schwarzenegger lived in California, *id.* at 807. Given that the "purpose of the

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[6] *See Panavision*, 141 F.3d at 1322 (finding that defendant had "directed his activity toward the forum state" because "[h]is conduct . . . had the effect of injuring Panavision in California where Panavision has its principal place of business and where the movie and television industry is centered"); *see also Bancroft*, 223 F.3d at 1088 (holding that defendant's letter "was expressly aimed at California because it individually targeted . . . a California corporation doing business almost exclusively in California").

[a]dvertisement was to entice Ohioans to buy or lease cars from [the dealership]"; "the [a]dvertisement was never circulated in California"; "and [the dealership] had no reason to believe that any Californians would see it," the Ninth Circuit found that defendant's act "was expressly aimed at Ohio rather than California". *Id.* Similarly, here, the facts demonstrate that any "express aim" would be at Russia, rather than Pennsylvania.

F. Tenth Circuit

Petitioners cite *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008), in which the Tenth Circuit found that there was jurisdiction in Colorado over an action alleging that the defendants filed a complaint in California with eBay to disrupt a Colorado plaintiff's Internet auction. *See id.* at 1067-68. However, the District Court explained why this case is inapposite: unlike in the case at bar, in which petitioners' Russian and Ukrainian offices and the Russian language of the Articles play a large role, "[t]he sole effect of the action taken by the *Dudnikov* defendants in California was to interfere with the plaintiff's auction in Colorado." App. 22a.

The absence of a circuit split is further evident from the fact that *Dudnikov* cites the Third Circuit's application of *Calder* with approval. 514 F.3d at 1074 n.9 (*citing Remick v. Manfredy*, 238 F.3d 248, 259-60 (3d Cir. 2001)); *see Remick*, 238 F.3d at 259 ("Given that the website was intended to provide information on [plaintiff] and that it was accessible worldwide, there is no basis to conclude that the defendants expressly aimed their allegedly tortious

activity at Pennsylvania knowing that harm was likely to be caused there").

G. Eleventh Circuit

Petitioners contend that the Eleventh Circuit's decision in *Licciardello v. Lovelady*, 544 F.3d 1280 (11th Cir. 2008), conflicts with the decision below. Pet. at 16. This is incorrect because *Lovelady* concerned a trademark violation, not defamation, and is therefore distinguishable. In finding jurisdiction to be proper, the Eleventh Circuit explained that the alleged tort was "expressly aimed at a specific individual in the forum whose effects were suffered in the forum." *Id.* at 1288. Thus, the court held that "[t]he Constitution is not offended by the exercise of Florida's long-arm statute to effect personal jurisdiction over Lovelady because his intentional conduct in his state of residence was calculated to cause injury to Carman in Florida." *Id.* at 1288. Here, respondents' conduct was not calculated to cause injury to petitioners in Pennsylvania. To the extent that the Articles posted by others on a website could be said to be the result of a calculation to cause petitioners injury, that injury was to be caused in Russia, as evidenced by the facts that the Articles were written in Russian and available only on Russian websites.

Conclusion

For the foregoing reasons, the Petition should be denied.

August 9, 2010

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IN THE

Supreme Court of the United States

BRUCE MARKS and MARKS, LLC
d/b/a MARKS & SOKOLOV, LLC,

Petitioners,

v.

ALFA GROUP a/k/a CROWN FINANCE FOUNDATION,
ALTIMO HOLDINGS & INVESTMENT LTD,
and FINANCIAL DYNAMICS LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' corporate disclosure statement was set forth at page *ii* of their Petition for a Writ of Certiorari, and there are no amendments to that statement.

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Defendants do not dispute that seven majority circuits sustain personal jurisdiction for intentional torts which "individually target" residents with the *intent* of harming them within the forum regardless of where communications are directed under the "effects" test enunciated in *Calder v. Jones*, 465 U.S. 783 (1984). Nor do they dispute that the three minority circuits require (1) communications to be directed to the forum; (2) communications concern forum related conduct; and/or (3) a "unique relationship" exists between plaintiff's profession and the forum – an "effect plus" which denies Americans in these Circuits a home forum. Rather than contesting the Circuit split, Defendants' opposition rests on three points:

First, Defendants argue that the "individually targeted" test would impose a rule that there is always personal jurisdiction in a defamation suit when the plaintiff is known to reside in the forum. However, this argument misstates the "individually targeted" test which sustains jurisdiction not merely because the plaintiff is known to reside in the forum, but because the defendant's *intent* is to cause harm in the forum, hardly the normal defamation matter.

Second, Defendants argue this case was properly decided under *Calder*, but offer no basis for the Third Circuit's requirements that jurisdiction be determined based on the content of communications and a "unique relationship" between the plaintiff's profession and the forum. Rather, Defendants' sole justification for the Third Circuit test is grounded on the requirement that communications be directed to the forum –which the majority Circuits reject, particularly in light of technological development.

Third, Defendants attempt to explain away the Circuit split by arguing the majority cases are inapposite because Plaintiffs did not suffer harm in their home forum. However, given Plaintiffs' allegations of harm in their home forum are accepted as true in the present procedural posture, this distinction goes nowhere. The recent *Tamburo v. Dworkin*, 601 F.3d 693 (7th Cir. April 8, 2010) decision upholding jurisdiction involving internet defamation could not make the conflict starker. This Court should resolve the conflict in favor of the majority "individually targeted" test to ensure a home forum for Americans targeted for harm by out of forum actors.

REPLY TO RESPONDENTS' STATEMENT OF THE CASE

In deciding the personal jurisdiction motion, the district court properly held a plaintiff "is entitled to have his allegations taken as true and all factual disputes drawn in his favor." App. B, page 8a. Thus, Defendants' efforts to "spin" the facts should be given no consideration. Rather, the following is assumed true:

First, Defendants "individually targeted" Plaintiffs with the *intention* of harming in their home forum in retaliation for their bringing *Norex* against Defendant Crown/Alfa. As the Third Circuit recognized:

> Seeking to kill two birds with one stone — to gain the upper hand in the public relations battle [against Telenor] and to extract revenge for the earlier [Norex] lawsuits — Altimo . . . distributed [the Releases] to the

> press . . . The [Releases] purported to identify a number of "illegal and inappropriate activities of Telenor" that were directed at Altimo management. . . . [The Releases] accused Telenor of engaging in a subversive public relations campaign directed, at least in part, by Marks . . . In addition, the letter attached two fabricated emails to support its accusations, one of which appeared to have been sent by plaintiff Bruce Marks . . .

Id. at 3a.

Second, the articles which Defendants procured on three websites did not merely contain "one statement" related to Plaintiffs.[1] Rather, as the Third Circuit stated:

> The [Release was] circulated to the press and was picked up by three Russian news organizations . . . Those organizations published to the internet articles repeating the allegations that . . . Marks had initiated a number of "ordered publications" — publications "obtained through bribery which appear[] as . . . news article[s], usually false, designed to . . . discredit a business competitor or blacken somebody's reputation."

Id. at 3a-4a.

---

1. Defendants repeat six times that the websites are "unconnected" to them. However, it is irrelevant whether Defendants own the websites on which they procured publication of the Releases.

Third, Plaintiffs suffered the "brunt" (if not all) of the harm in Pennsylvania, where Marks resides and M&S maintains its only office from which the *Norex* work was done. [Rec. 1, Compl. ¶¶ 1-4, 13-14, Rec. 50, Decl. of B. Marks]. That M&S may have sister companies with offices in Moscow and Kyiv is irrelevant to where *Plaintiffs* suffered harm.

REPLY ARGUMENT

Defendants do not contest a state "has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985). Nor do they really dispute that internet technology has changed "modern commercial life," as *Burger King*, 471 U.S. at 476, foreshadowed. Their attempt to defend the Third Circuit test and obscure the Circuit split should be rejected.

A. The "Individually Targeted" Test Establishes No *Per Se* Rule of Jurisdiction

The "individually targeted" test adopted by seven majority Circuits does not establish a rule that there is always jurisdiction in a defamation case when the plaintiff is known to reside in the forum. Defamation "by definition" does not necessarily "individually target" the person defamed, contrary to Defendants' argument. Rather, a person may be defamed in an article whose focus is different. For example, *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002) denied jurisdiction because the focus was reporting on how Connecticut

prisoners were treated in Virginia, not the role played by the Virginia warden plaintiff. More importantly, the "individually targeted" test sustains jurisdiction because the defendants *intended* to harm the plaintiff in the forum. As *Dudnikov v. Chalk & Vermillion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008) explained:

> our case is an easier one than *Calder* itself. There, the defendants intended to write an article, the "focal point" of which was California, for the *Enquirer* to publish and distribute in California. 465 U.S. at 789. Yet, the effects of which the plaintiff complained likely were not bound up in the defendants' intentions. The defendant writer and editor were professionals presumably interested chiefly in the sale of newspapers, not in doing *intentional* harm to Ms. Jones; that is, while they *knew* their article would have adverse effects on her in California, those effects were to them perhaps no more than foreseeable side-effects. By contrast, defendants here more than foresaw or knew the harm alleged to have befallen forum residents; indeed, they do not dispute that they *intended* to cause the cancellation of plaintiffs' auction . . . *[A]ctions that "are performed for the very purpose of having their consequences felt in the forum state" are more than sufficient to support a finding of purposeful direction under Calder.*

Id. at 1077-78 (emphasis added).

In short, the "individually targeted" test is narrowly drawn to sustain jurisdiction where a defendant *intends* to harm the plaintiff within the forum.

B. The Third Circuit Does Not Correctly Apply *Calder*

Defendants do not dispute that this matter was dismissed because of the Third Circuit's narrow interpretation of *Calder* which requires (1) communications be directed to the forum; (2) communications refer to the plaintiff's forum conduct; and/or (3) a "unique relationship" exist between the plaintiff's profession and the forum. However, such requirements are not supported by *Calder*.

First, seven Circuits hold that there is no requirement that communications be directed to the forum if the defendant *intended* to harm the plaintiff in the forum. The key to *Calder* was the defendants' foreseeability of causing harm in California because of the *National Enquirer's* circulation there, based on technology at the time. Today, internet publication is more egregious than forum based "paper" media because it intentionally reaches a broader audience and can be permanent.[2]

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2. Defendants make ado about the internet publications being read outside of the United States. However, the issue is whether out of forum publication which is intended to cause harm within the forum satisfies *Calder*. If so, it makes no difference in which out of forum location publication occurs, whether foreign or domestic

Second, Defendants make no principled argument that *Calder* conditions personal jurisdiction on the content of defamatory speech. In *Calder*, Jones' harm was suffered by the *nature* of the accusations, not because the alleged excess drinking necessarily occurred in California. Defendants' distinction that the website articles do not refer to forum based conduct or sources, like *Calder*, is irrelevant; after all, there were *no* conduct or sources –Defendants' allegations and emails were fabricated.[3] It makes no sense to sustain jurisdiction only if a plaintiff is the subject of defamation regarding forum conduct, but not when the defamation concerns even more egregious harmful out of forum allegations, as here.[4]

Third, Defendants make no attempt to defend the requirement that there be a "unique relationship" between plaintiffs and forums (even though they argued it below); this was relevant in *Calder* only to establish the foreseeability of harm in the pre-internet era because California based industry decision-makers were likely to read the *National Enquirer* there.

In sum, *Calder* does not support the Third Circuit's "effects plus" test.

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3. The dissent in *Clemens v. McNamee*, 2010 U.S.App. LEXIS 16718 (5th Cir. 2010), a minority circuit case, trenchantly explains why whether "the defamatory statements concerned the forum" and "the sources . . . were in the forum" are irrelevant under *Calder*.

4. Defendants' assertion that publication in Russian language websites makes jurisdiction less likely has it exactly opposite. By publishing in Russian, Defendants deliberately targeted Plaintiffs' client audience, in Pennsylvania and elsewhere.

C. The Minority "Effects Plus" Test Conflicts With Seven Majority Circuits Which Do Not Require Communications Be Directed Into the Forum

Defendants concede that the majority Circuits impose no requirement that personal jurisdiction be conditioned on the content of speech or a "unique relationship" between the plaintiff's profession and the forum. Instead, Defendants attempt to white-wash the conflict by arguing Plaintiffs were not harmed in Pennsylvania and various irrelevant distinctions. On the facts of this case, all majority Circuits would have sustained jurisdiction, as recently illustrated by *Tamburo*.

Expressly adopting *Dudnikov*, *Tamburo* sustained jurisdiction over defendants who "purposely targeted Tamburo and his business in Illinois with the express goal of inflicting commercial and reputational harm on him there, even though their alleged defamatory and otherwise tortious statements were circulated more diffusely through [publications on] the internet." *Id.* at 707. "Tortious acts aimed at a target in the forum state and undertaken for the express purpose of causing injury there are sufficient to satisfy *Calder's* express-aiming requirement." *Id.* at 707.[5] In contrast, the Third Circuit would have declined jurisdiction because the internet communications were not primarily directed at Illinois and there was no unique relationship between

5. Defendants attempt to distinguish *Tamburo* asserting "the defendant sent blast emails". However, only one of many defendants over which jurisdiction was sustained sent such emails.

Tamburo's "dog pedigree software" and the forum.[6] The Third Circuit's test conflicts with the seven Circuits listed below.

1. First Circuit

Northern Laminate Sales, Inc. v. Davis, 403 F.3d 14, 26 (1st Cir. 2005) sustained jurisdiction because Davis made misrepresentations outside of the forum which he knew would be relied upon and cause harm in the New Hampshire forum. Citing *Calder*, the court sustained jurisdiction because of Davis "knowing full well that his statements . . . would likely cause financial injury [in the forum state]." While Defendants argue that Davis sent a bad check and mail into the forum, this was irrelevant to the court's decision, which relied on the subsequent out-of-forum statements. *Id* at 26-27.

2. Fourth Circuit

First American First, Inc. v. Nat'l Assoc of Bank Women, 802 F.2d 1511, 1517 (4th Cir. 1986) reversed dismissal over defendants who circulated defamatory letters outside of plaintiffs' home state throughout the country, with the intent of interfering with plaintiffs' business in the forum, holding the defendant "knew . . .

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6. *See Remick v. Manfredy*, 238 F.3d 248 (3rd Cir. 2001) (denying jurisdiction because publications about forum based attorney were not circulated solely within the forum and no unique relationship existed between attorney's profession and forum); *Marten v. Godwin*, 499 F.3d 290 (3rd Cir. 2007) (denying jurisdiction because letter about forum resident was circulated outside the forum).

that its allegedly defamatory letters would inflict the greatest injury upon Leake in the state in which he resided and conducted his business." To the extent the defendant sent letters within the forum, as Defendants argue, this was irrelevant to *First American's* holding which sustained jurisdiction based on the defendant's intent to cause harm within the forum through out-of-forum letters which individually targeted the forum resident. Defendants' factual argument that they did not intend to harm Plaintiffs in Pennsylvania misses the mark; Plaintiffs' allegations are presumed true. In *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), there was no allegation that the newspaper's *intent* was to harm the warden in Virginia.

3. Seventh Circuit

Janmark, Inc. v. Reidy, 132 F.3d 1200, 1202 (7th Cir. 1997) held "there can be no serious doubt after *Calder v. Jones* . . . that the state in which the victim of a tort suffers the injury may entertain a suit against the accused tortfeasor." In attempting to distinguish *Janmark*, Defendants argue the facts as to where Plaintiffs were harmed, an irrelevancy given Plaintiffs' allegations are accepted as true. *Tamburo* concluded *Janmark* "was premised on the Illinois-based injury *and* the fact that the defendant acted with the purpose of interfering with sales originating in Illinois. Thus, despite its broad language, *Janmark* ultimately considered the relationship between the allegedly tortious conduct and the forum state itself." *Tamburo*, 601 F.3d at 706.

4. Eighth Circuit

Dakota Industries, Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384, 1390-91 (8th Cir. 1991), reversed dismissal where plaintiff sued defendant for trademark infringement, holding that *Calder* "approved an 'effects test' that allows the assertion of jurisdiction over non-resident defendants whose acts are performed for the very purpose of having their consequences felt in the forum state." Defendants do not contest *Dakota* permits jurisdiction when the acts are performed outside of the forum. *Hicklin Engineering, Inc. v. Aidco, Inc.*, 959 F.2d 738 (8th Cir. 1992) does not contradict *Dakota*. *Hicklin* merely held that when companies, like Aidco, "solicit the customers of its competitors, it necessarily wishes to have customers believe that its products are superior and to place its competitor's products in a less favorable light . . . absent additional contacts, this effect alone will not be sufficient to bestow personal jurisdiction." *Hicklin*, 959 F.2d at 739. Instantly, Defendants are not accused of acting for some proper business purpose; they deliberately attempted to harm Plaintiffs in their home forum in retaliation for *Norex*.

5. Ninth Circuit

Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998) and *Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d 1082, 1087-88 (9th Cir.2000) carefully developed the "individually targeted" test, with *Bancroft* holding:

> when the defendant is alleged to have engaged in wrongful conduct targeted at a

> plaintiff whom the defendant knows to be a resident of the forum state ... *"express aiming" encompasses wrongful conduct individually targeting a known forum resident ... The letter was expressly aimed at California because it individually targeted B&M, a California corporation doing business almost exclusively in California.*

(emphasis added).

The *Panavision/Bancroft* "individually targeted" test is hardly "doubtful authority" in the Ninth Circuit, particularly given *Menken v. Emm*, 503 F.3d 1050, 1059 (9th Cir. 2007), which reaffirmed that "expressly aimed at the forum state . . . requirement [is] satisfied 'when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.'" *Menken* was decided after *Schwartzenegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004), where there was no allegation that the defendant *intended* to harm the plaintiff in his home forum, despite using his image without permission.

6. Tenth Circuit

Dudnikov, 514 F.3d at 1075-78, sustained jurisdiction even though the communication at issue was not directed within the forum, holding:

> [While the communication] formally traveled only to California, it can be fairly characterized as an intended means to the further intended

> end of cancelling plaintiffs' auction in Colorado. In this way, it is something like a bank shot in basketball. A player who shoots the ball off of the backboard intends to hit the backboard, but he does so in the service of his further intention of putting the ball into the basket . . . *Their "express aim" thus can be said to have reached into Colorado in much the same way that a basketball player's express aim in shooting off of the backboard is not simply to hit the backboard, but to make a basket . . . [A]ctions that "are performed for the very purpose of having their consequences felt in the forum state" are more than sufficient to support a finding of purposeful direction under Calder.*

(emphasis added).

Defendants' attempt to distinguish *Dudnikov* rests solely on the misguided factual argument that Plaintiffs did not sustain the "brunt" of their harm in the forum.

7. Eleventh Circuit

Licciardello v. Lovelady, 544 F.3d 1280, 1288 (11th Cir. 2008), applying *Calder* within the internet setting, held that communication need not be directed to the forum in order to sustain personal jurisdiction:

> The unauthorized use of Carman's mark, therefore, individually targeted Carman in order to misappropriate his name and reputation for commercial gain. *These*

> *allegations satisfy the Calder effects test for personal jurisdiction — the commission of an intentional tort, expressly aimed at a specific individual in the forum whose effects were suffered in the forum.*

(emphasis added) Again, Defendants' attempt to distinguish is based on the misguided factual argument that Plaintiffs were not harmed within the forum.

CONCLUSION

Certiorari is warranted to resolve a split between the Circuits and confirm personal jurisdiction under *Calder* may be sustained when defendants commit intentional torts which "individually target" forum residents for harm *intended* to be inflicted in the forum in order to protect the fundamental right of states to provide a forum for residents to redress intentional harm caused by out of forum actors.

Respecfully submitted,

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